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SHORT TITLE: [Campbell, Jimmy, et al.]
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3	Apr 20 1992		Brief of respondent Jay Brummett in opposition filed.
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Nos. 91-1515

In the Supreme Court of the United States

OCTOBER TERM, 1991

JIMMY CAMPBELL, JIM BOLES, DOUG SANDERS, AND FIRST STATE BANK OF CLEBURNE, TEXAS,

PETITIONERS,

v.

JAY BRUMMETT,

RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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March 19, 1992

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Civil Rights Act of 1871, 42 U.S.C. § 1983, provides a cause of action for "malicious prosecution"?

2. Whether a § 1983 cause of action for malicious prosecution, if any, is coextensive with the state common law tort of "malicious prosecution"?

3. Whether the termination of the underlying criminal proceeding in favor of the § 1983 plaintiff is an essential element of a § 1983 claim premised on "malicious prosecution"?

4. Whether the limitations period applicable to a § 1983 claim premised on "malicious prosecution" begins to accrue only when the underlying criminal proceeding has been terminated in favor of the § 1983 plaintiff?

LIST OF INTERESTED PERSONS

1. Parties Below

a. Jimmy Campbell
b. Jim Boles
c. Douglas Sanders
d. Dan Boulware
e. John R. MacLean
f. First State Bank of Cleburne, now known as Community Bank of Cleburne, Texas
g. Johnson County Texas
h. Jay Brummett

2. Rule 29.1 Declaration

Community Bank's parent organization is Community Bankers, Inc. Community Bank has no non-wholly owned subsidiaries.

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Nos. _____

In the Supreme Court of the United States

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JIMMY CAMPBELL, JIM BOLES, DOUG SANDERS,
AND FIRST STATE BANK OF CLEBURNE, TEXAS,

PETITIONERS,

v.

JAY BRUMMETT,

RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners Jimmy Campbell ("Campbell"), Jim Boles ("Boles"), Doug Sanders ("Sanders") and First State Bank of Cleburne, Texas ("FSB-Cleburne") respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit reversing a summary judgment granted Petitioners by the United States District Court for the Northern District of Texas (Sanders, J.).

I. OPINIONS BELOW

The November 14, 1991 decision of the United States Court of Appeals for the Fifth Circuit reversing the District Court's grant of summary judgment is reported at 946 F.2d 1178, and is reprinted as Appendix B, at page A-4. The June

4, 1990 and August 8, 1990 Orders of the United States District Court for the Northern District of Texas, from which appeal was taken, are unreported, and are reprinted as Appendix C and Appendix E, at pages A-20 and A-23 respectively.

II. JURISDICTION

The Court of Appeals' decision was filed on November 14, 1991. The Court of Appeals denied Petitioner's timely petition for panel rehearing on December 20, 1991. *See* Appendix A at page A-3.

This Court's jurisdiction is invoked under 28 U.S.C. § 1254 (1).

III. CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

42 U.S.C. § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

IV. STATEMENT OF THE CASE

A. FACTUAL BACKGROUND.

In January of 1982, Plaintiff Jay Brummett, d/b/a the Stereo Center, borrowed $33,445.80 from the First State Bank of Cleburne and executed a

promissory note in that sum in favor of FSB-Cleburne. The note was secured by, *inter alia*, the stereophonic equipment and inventory of Brummett's retail stereo equipment business in Cleburne, Texas.

After March of 1983, Plaintiff Brummett ceased to make the payments due under the note to FSB-Cleburne and, by the first week of April, 1983 had closed the Stereo Center and liquidated the inventory collaterizing the loan. Brummett retained for himself the proceeds of that liquidation.

After considering the default and the expropriation of the collateral, FSB-Cleburne President Jimmy Campbell directed loan officer Doug Sanders to present the file to the District Attorney for his review. No FSB-Cleburne officer or employee, including Mr. Campbell or Mr. Boles, accompanied Mr. Sanders to the District Attorneys' office.

Mr. Sanders attempted to present the file to the District Attorney, but District Attorney MacLean's office referred him to the County Attorney's (Mr. Boulware's) office. Mr. Sanders then advised the County Attorney's office that the loan was past due, and that the inventory securing it was gone, and asked that the Brummett file be reviewed. He then left the file with the County Attorney. Mr. Sanders did not tell the County Attorney that Mr. Brummett had violated any law.

He did not recommend or suggest that Mr. Brummett be prosecuted. He did not suggest that the County Attorney bring any specific charges against Mr. Brummett. Mr. Sanders was not authorized to sign and did not sign a complaint against Mr. Brummett.

When Mr. Sanders left the County Attorney's office, he did not know what actions the County Attorney or the District Attorney would or would not take regarding Mr. Brummett or when he would take them.

Mr. Sanders was unaware that charges had been drawn up, or that the Brummett matter would be presented to the Johnson County grand jury until he was required to testify before that grand jury in connection with the matter. He did testify before the grand jury, and answered all their questions in a truthful manner. He did not otherwise involve himself with the activities of the Grand Jury.

While waiting to testify, Mr. Sanders met Mr. Brummett, who was himself preparing to testify before the grand jury. Of course, Mr. Brummett did have a full opportunity to testify, and did testify at length, before the Johnson County grand jury. However, the grand jury evidently did not take his testimony to be convincing; it indicted him for a felony violation of TEX. PENAL CODE § 32.33[1] shortly after his testimony was concluded. Mr. Brummett was advised of the indictment the next day, July 1, 1983.

Mr. Brummett was never arrested, at least in the conventional sense, or incarcerated. He appeared at the Johnson County jail on July 1, 1983 and at several different hearings in his case thereafter. The indictment was sustained at least once, at an August 27, 1984 evidentiary hearing. Eventually, the prosecution dropped the case by filing a Motion to Dismiss on April 9, 1986.

Mr. Sanders did not discuss the Brummett case with any representatives of the Johnson County District Attorney's office and/or County Attorney's office at the time of his grand jury testimony, and he has not discussed the matter with such persons at any time other than in the meeting in which he presented the loan file to the County Attorney. Mr. Boles never had any contacts with the Johnson County grand jury, or with the County Attorney's or District Attorneys' offices regarding the Brummett matter. Mr. Campbell's only contact with the County Attorney's and/or District Attorney's offices regarding Mr. Brummett was when he was called by the District Attorney and advised that the charges against Mr. Brummett were

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[1] A copy of TEX. PENAL CODE ANN. § 32.33, as it existed on July 1, 1983, is attached hereto as Appendix H at page A-37.

being dropped. He had no contacts regarding Mr. Brummett with the Johnson County grand jury.

B. COURSE OF PROCEEDINGS AND DISPOSITION BELOW.

On March 26, 1987, Plaintiff Brummett sued both the Public Defendants (Defendants Boulware, MacLean and Johnson County, Texas) and the Private Defendants, (Defendants Campbell, Boles, Sanders and FSB-Cleburne) alleging that : (1) they had deprived him of his civil rights, and so violated 42 U.S.C. § 1983; and (2) they had maliciously prosecuted him.

On June 1, 1987, this Court dismissed the entire case as to all Defendants. As to Defendants Campbell, Boles, Sanders, and First State Bank of Cleburne, the Court observed that :

> Camble [sic], Boles, Sanders, and the First State Bank of Cleburne are . . .dismissed because they have not engaged in state action. A private person has not engaged in state action when he merely lodges a complaint with the police, the prosecutor, or when he invokes the exercise of judicial authority. *Sims v. Jefferson Downs Racing Association*, 778 F.2d 1068, 1079 n.7 (5th Cir. 1985).

Order of June 1, 1987 (Appendix G at page A-34) at 3. The Court then allowed Plaintiff to replead his case, in light of *Elliott v. Perez*, 751 F.2d 1472, 1479 n.20 (5th Cir. 1985) and Plaintiff did, in fact, replead his Complaint, by devising the public-private conspiracy allegations contained in what is now paragraph 18 of his Amended Complaint.

On January 13, 1988, after the case had been repleaded, the District Court dismissed the Public Defendants from the suit on immunity grounds. As to the Private Defendants, the District Court held that the pleading of paragraph 18 allowed the Amended Complaint to survive the low-level scrutiny given to those motions to dismiss filed pursuant to Fed. R. Civ. P. 12(b)6). *See* Appendix F.

The Private Defendants subsequently moved for summary judgment on all counts. On June 4, 1990, the Court rendered summary judgment for the Private Defendants on limitations grounds, and dismissed the state law malicious prosecution count, without prejudice, pursuant to *United Mine Workers v. Gibbs*, 383 U.S. 715, 726 (1966). *See* Appendices D and E. That summary judgment was then affirmed when the District Court denied Plaintiff's Motion for New Trial and Reconsideration on August 8, 1990. *See* Appendix C.

As previously noted, the Court of Appeals reversed the District Court's grant of summary judgment in favor of the Petitioners on November 14, 1991, and the Petitioners' motion for rehearing was denied on December 20, 1991. *See* Appendices B and A respectively.

C. THE QUESTIONS BEFORE THIS COURT.

On petition for writ of certiorari, the Private Defendants ask this Court to review this case and to hold that Plaintiff Brummett has no § 1983 "malicious prosecution" cause of action against the Private Defendants. A negative answer to the first, third or fourth of the questions Petitioners have submitted for review will have that result. A negative answer to the second of Petitioners' questions may also have that result.

1. The Undisputed Issues Relevant To The Questions Before This Court.

Neither the courts below nor the parties appear to dispute: (1) that the relevant statute of limitations is the two year statute supplied by TEX. CIV. PRAC. & REM. CODE § 16.003, *see* 946 F.2d at 1183; *see also* Appendix H; (2) that federal law determines when a § 1983 cause of action accrues, *id.* at 1184; or (3) that the courts of the Fifth Circuit have determined that a § 1983 claim accrues when the plaintiff "becomes aware that he has suffered an injury or has sufficient information to know that he has been injured," *id.*

Since it is undisputed that Plaintiff's suit was filed on March 26, 1987, the parties and the courts below would also seem to agree that, if Brummett's § 1983 cause of action accrued prior to March 26, 1985, it is time-barred.

2. The Disputed Issues Relevant To The Questions Before This Court.

Brummett contends that § 1983 provides a cause of action for malicious prosecution, that such action is co-extensive with the state common law tort, that the favorable termination of the underlying criminal proceeding is an essential element of his § 1983 claim and, that the statute of limitations began to run on April 9, 1986, when the state prosecution terminated in his favor (thereby establishing the favorable termination element).

The Private Defendants contend that: § 1983 does not provide a cause of action for malicious prosecution; that, if it does provide such an action, it is an action that is *different* in important respects from the cause of action provided by the state common law tort; that favorable termination is *not* an essential element of any such § 1983 "malicious prosecution" claim; and, therefore, that the statute of limitations began to run on July 1, 1983, when Brummett learned he had been indicted by the Johnson County Grand Jury and turned himself in to the authorities.

3. The Court of Appeals' View Of The Issues Before This Court.

The Court of Appeals' opinion holds that § 1983 does provide a cause of action for malicious prosecution, that it is (apparently) co-extensive with the state common law tort, that the termination of the underlying criminal proceeding in favor of

the accused is an essential element of "a claim under § 1983 for malicious prosecution," and that the statute of limitations began to run only when the Brummett prosecution was voluntarily dismissed by the prosecutors.

Given these premises, the Court of Appeals concluded that "Brummett's suit was filed less than two years after the underlying criminal proceeding terminated in his favor" and, therefore, that "his § 1983 malicious prosecution claim was timely filed." 946 F.2d at 1184.

V. REASONS FOR GRANTING THE WRIT

This Court should grant the writ to resolve conflicts between the circuits: (1) regarding the existence or non-existence of, and/or the nature of, any § 1983 cause of action for "malicious prosecution"; and (2) regarding the accrual, for statute of limitations purposes, of any such § 1983 actions for malicious prosecution.

It should also grant the writ so as to bring Fifth Circuit law, and the law in the other circuits, into conformity with this Court's decisions in *Baker v. McCollan*, 443 U.S. 137, 99 S.Ct. 2689 (1979), *Wilson v. Garcia*, 471 U.S. 261, 105 S.Ct. 1938 (1985), *Owens v. Okure*, 488 U.S. 235, 109 S.Ct. 573 (1989), and *Collins v. City of Harker Heights*, ____ U.S. ____, 1992 WL32006 (February 26, 1992), and, in the process, avoid the practical problems for the federal and state courts

that will inevitably arise if the Court of Appeals' decision is allowed to stand.

A. THE 'DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT IS IN CONFLICT WITH THE DECISIONS OF OTHER UNITED STATES COURTS OF APPEALS ON THE SAME MATTER.

One need look no further than Footnote No. 2 of the Court of Appeals' opinion to see: (1) that the circuits are split as to whether there is a § 1983 action for malicious prosecution; (2) that the circuits are split as to the elements of such an action; and (3) that Courts of Appeals like the Fifth Circuit court below would welcome more guidance as they try to deal with "the undefined overlap between state common law tort actions and federal civil rights actions brought pursuant to § 1983." 946 F.2d at 1183.

That lengthy and very confused footnote provides as follows.

> Our most recent cases have assumed that malicious prosecution violates § 1983. *See Thomas v. Kippermann*, 846 F.2d 1009 (5th Cir. 1989); *Hand v. Gary*, 838 F.2d 1420, 1426 (5th Cir. 1988); *Wheeler v. Cosden Oil & Chemical Co.*, 734 F.2d 254 (5th Cir. 1984). Not long ago, however, our court had held that torts of abuse of process (of which malicious prosecution is a branch) were not encompassed within § 1983. *Cook v. Houston Post*, 616 F.2d 791, 794 (5th Cir. 1980) (malicious prosecution); *Beker Phosphate Corp. v. Muirhead*, 581 F.2d

1187 (5th Cir. 1978); *Curry v. Ragan*, 257 F.2d 449 (5th Cir. 1956).

Mysteriously, other circuit courts seem also to have flip-flopped on the constitutional tort status of malicious prosecution. *Compare Torres v. Superintendent of Police of Puerto Rico*, 893 F.2d 404, 408 (1st Cir. 1990) (§ 1983 includes malicious prosecution), with *Cloutier v. Town of Epping*, 714 F.2d 1184, 1190 (1st Cir. 1983) (no § 1983 malicious prosecution action), and with *Sullivan v. Choquette*, 420 F.2d 674 (1st Cir. 1969), *cert. denied*, 398 U.S. 904, 90, S.Ct. 1691, 26 L.Ed.2d 62 (1970). *Also compare Duncan v. Peck*, 844 F.2d 1261, 1267 (6th Cir. 1988), with *Dunn v. State of Tenn.*, 697 F.2d 121 (6th Cir. 1982) (no § 1983 malicious prosecution action unless plaintiff was deprived of specific constitutional right). Still other circuits have consistently held that there is a § 1983 action against malicious prosecution; *Inada v. Sullivan*, 523 F.2d 485, 487-88 (7th Cir. 1975); *White v. Frank*, 855 F.2d 956, 961 n.5 (2d Cir. 1988); *Losch v. Borough of Parkesburg, Pa.*, 736 F.2d 903, 907 (3d Cir. 1984); *Morrison v. Jones*, 551 F.2d 939 (4th Cir. 1977).

The Ninth Circuit has held that there is no § 1983 malicious prosecution claim unless the prosecution is conducted with the intent to deprive a person of equal protection or other enumerated constitutional rights. *Usher v. City of Los Angeles*, 828 F.2d 556, 561-62 (9th Cir. 1987).

Only Judge Gee's opinion in *Wheeler, supra*, has endeavored to explain why a malicious prosecution might always violate the constitution so as to be actionable under § 1983, and he founded that conclusion with admitted tentativeness on the

> implied constitutional right to have charges brought only upon probable cause. Whether *Wheeler* would survive the Supreme Court's recent attempt to predicate constitutional rights on a more textual footing is arguable. *See, e.g., Wilson v. Seiter*,—U.S.—, 111 S.Ct. 2321, 115 L.Ed.2d 271 (1991). *Wheeler* would, however, clearly survive to the extent that a malicious prosecution caused a plaintiff's pretrial detention or otherwise infringed specific constitutional guarantees. The Supreme Court may have to decide this question someday. *See, e.g., Cerbone v. Conway*, 479 U.S. 84, 107 S.Ct. 390, 93 L.Ed.2d 325 (1986), *writ dismissed as improvidently granted.*

Other cases could be cited as well, including those which derive different § 1983 accrual dates, for statute of limitations purposes, from the fact that the § 1983 "malicious prosecution" causes of action in the different circuits have different elements. Thus in the Fifth (after *Brummett*), Third, and Sixth Circuits, for instance, the limitations period for a § 1983 malicious prosecution claim begins to run when the criminal proceedings brought against the § 1983 plaintiff are terminated in his or her favor. *See Rose v. Bartle*, 871 F.2d 331, 349 (3d Cir. 1989); *McCune v. City of Grand Rapids*, 842 F.2d 903, 907 (6th Cir. 1988). In the Ninth and First Circuits however, the rule is different. *See Gowain v. Altmiller*, 663 F.2d 820, 822 (9th Cir. 1981) (§ 1983 malicious prosecution claim accrued when arrest occurred and not, as plaintiff argued, when his conviction was reversed); *Walden III*,

Inc. v. State of Rhode Island, 576 F.2d 945, 947n.5 (1st Cir. 1978) (malicious use of process claim accrues when federal right is violated, and not when the allegedly abusive proceedings have come to an end); *see also Ruley v. Nelson,* 106 F.R.D. 514, 516-517 (D.Nev. 1985); *Edwards v. Sotomayor,* 557 F.Supp. 209, 218 (D.P.R. 1983).

B. THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT'S DECISION CONFLICTS WITH APPLICABLE DECISIONS OF THIS COURT ON THE SAME OR RELATED FEDERAL QUESTIONS.

1. The Court of Appeals Ignored *Baker v. McCollan* and So Erred In Its Analysis Of The Actionability, Under § 1983, of Malicious Prosecution Claims.

While the Court of Appeals admits that Fifth Circuit panels are divided on the issue, and that the Circuits are seriously split on the issue, it seems to conclude, albeit very tentatively, that malicious prosecutions violate § 1983[2]. It reaches this conclusion (1) because the most recent Fifth Circuit opinions "assume" that malicious prosecutions violate § 1983; and (2) because Judge Gee, in *Wheeler v. Cosden Oil & Chemical Co.*, 734 F.2d

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2 The Court also states that Defendants do not dispute that malicious prosecution can form the basis of a § 1983 claim. 946 F.2d at 1180n.2. That is not so. *See* the "Amended Brief of Appellees Campbell, Boles, Sanders, and First State Bank of Cleburne" at 20-24.

254 (5th Cir. 1984) argued "with admitted tentativeness" that a malicious prosecution "might always violate the Constitution so as to be actionable under § 1983" because such prosecutions would violate the "implied constitutional right to have charges brought only upon probable cause." 946 F.2d at 1180n.2.

The Court makes no effort to identify precisely its own views as to the legitimacy of a § 1983 action charging malicious prosecution, or to identify which specific types of malicious prosecution actions it believes to be cognizable under § 1983—if *all* malicious prosecution actions are not to be cognizable under § 1983. In consequence, the parties hereto are left with only the vague understanding that state malicious prosecutions have been federalized in the Fifth Circuit, at least until the United States Supreme Court overrules *Wheeler's* "admittedly tentative" view that all malicious prosecutions are actionable under § 1983.

More is required. Since the law requires that the Court consider § 1983 claims broadly as personal injury claims cognizable under the statute—and also requires the Court to determine when the Plaintiff became aware that he suffered his particular § 1983 personal injury, or had sufficient information to know that he had been personally injured by a § 1983 violation, so that the

parties can determine when the limitations period accrues—the parties must know whether all or some malicious prosecutions are personal injuries actionable in this Circuit, and if only some are actionable, how they may be identified.

The Court avoids these requirements by adopting the state common law rules for accrual, of course, and that is a significant error that the Court makes in two unnecessary and insupportable steps. First, it reads *Wheeler v. Cosden Oil & Gas* to mean that all malicious prosecution cases are actionable under § 1983. Second, having decided that all malicious prosecutions are actionable under § 1983—thereby eliminating the differences between the federal cause of action and the state tort, the Court imports into § 1983 the trappings of the state law action for malicious prosecution.

This federalization of state law is not sustainable. The misreading of *Wheeler* is unjustifiable because that case, and the other cases cited by the Court as supporting the actionability, under § 1983, of malicious prosecution,[3] do not stand for the proposition that any malicious prosecution torts other than those that violate the constitutional rights of the Plaintiff are cognizable

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3 *Thomas v. Kipperman*, 846 F.2d 1009 (5th Cir. 1989); *Hand v. Gary*, 838 F.2d 420, 1426 (5th Cir. 1988); *see also Shaw v. Garrison*, 467 F.2d 113 (5th Cir. 1972).

under § 1983. Further none of those cases support the proposition that an essential element of state malicious prosecution tort law must be engrafted into § 1983 as a new "essential element" to a § 1983 action.[4] To the contrary, the § 1983 action for malicious prosecution recognized in those cases is a simple tort—that is wholly complete when the putative plaintiff has been prosecuted without probable cause.

The cases relied on by the Court of Appeals below miss the key point of this Court's decision in *Baker v. McCollan*, 443 U.S. 137, 145, 99 S.Ct. 2689, 2695 (1979). In that false imprisonment case, after reiterating its view that all wrongs are not cognizable under § 1983, this Court observed that "[t]he Constitution does not guarantee that only the guilty will be arrested. If it did, § 1983 would provide a cause of action for every defendant acquitted—indeed, for every suspect released."

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4 In Texas, the essential elements of a § 1983 action have long been understood to be: (1) that the Plaintiff has been deprived of a right "secured by the Constitution and [the] laws" of the United States; and (2) that the persons alleged to have deprived him or her of this right have acted "under color of any statute" of the State of Texas. *See, e.g., Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 155 (1978); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 140 (1970). The new "essential element"—the favorable termination element—engrafted into the statute by judicial amendment might be added as "(3) except in cases where the Plaintiff alleges malicious prosecution, in which case § 1983 requires that the Plaintiff also establish that his or her prosecution has terminated favorably."

Petitioners submit that the Fifth Circuit in this case created the cause of action that *Baker v. McCollan* rejected.

2. In Answering the Limitations Questions, the Court of Appeals Has Overlooked (and Affronted) the Line of U.S. Supreme Court Cases Beginning With *Wilson v. Garcia*

a. Wilson v. Garcia.

In *Wilson v. Garcia*, 471 U.S. 261, 266-280, 105 S.Ct. 1938, 1942-1950 (1985), the United States Supreme Court, relying on federal law (particularly 42 U.S.C.§ 1988), and on established "federal interests in uniformity, certainly, and the minimization of unnecessary litigation", 107 S.Ct. at 1946, held: (1) that federal (not state) law governs the characterization of § 1983 claims for statute of limitations purposes; (2) that all § 1983 claims should be characterized the same way—and not evaluated differently depending upon the varying factual circumstances and legal theories presented in each individual case; (3) that § 1983 actions should be broadly characterized as personal injury actions; and (4) that such a characterization was not inconsistent with federal law or policy.

From these premises, the *Wilson* court went on to hold that the forum state's limitations statute that was applicable to personal injury actions was

the appropriate statute of limitations for use in § 1983 actions.

b. Wilson's Progeny.

The significance of *Wilson v. Garcia* lies not in its identification of the particular type of limitations statute to be employed in § 1983 actions, but in the thoughtful analytical framework the *Wilson* court employed in reaching its particular decision. That framework has been employed repeatedly since *Wilson* to analyze statute of limitations issues in situations, like that in *Wilson*, where Congress had failed to provide a federal statute of limitations for a federal cause of action. Thus, after stating that it assumed that *Wilson* also controlled cases brought under § 1981, *see St. Francis College v. Al Khazraji*, 481 U.S. 604, 107 S.Ct. 2022, 2025 (1987), the Supreme Court applied the *Wilson* principles to hold that § 1981 claims would be characterized as personal injury actions and governed by the forum state's limitations rules applicable to personal injury actions in *Goodman v. Lukens Steel Co.*, 482 U.S. 656, 107 S.Ct. 2617, 2619-2622 (1987). Numerous other applications of the *Wilson* principles may be cited.[5]

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[5] *E.g.* when faced with the question of what limitations rules would be applied to actions as diverse as RICO, *see Agency Holding Corp. v. Malley Duff & Associates, Inc.*, 483 U.S. 143, 107 S.Ct. 2759, 2762-2767 (1987), and union members' free speech actions brought pursuant to § 101(a)(2) of the Labor Management Reporting and

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c. *Owens v. Okure*

In 1989, the Court added yet another refinement to the *Wilson* limitations holdings by way of a further application and reaffirmation of the general *Wilson* principles. Thus in *Owens v. Okure*, 488 U.S. 235, 109 S.Ct. 573 (1989), the Court filled a gap in the *Wilson v. Garcia* opinion by holding that where the forum state's law provides multiple statutes of limitations for personal injury actions, courts considering § 1983 claims should borrow the broader general or

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Disclosure Act, 29 U.S.C. § 411(a)(2), *see Reed v. United Transportation Union*, ____ U.S. ____, 109 S.Ct. 621, 624-629 (1989),the Supreme Court began its analysis with the *Wilson* principles, though the results in *Malley Duff* (the imposition of federal limitations rules) and in *Reed* (the imposition of the forum state's limitation rules applicable to state law personal injury actions) were quite different. *See also Lampf, Pleva & Lipkind v. Gilbertson*, ____ U.S. ____, 111 S.Ct. 2773, 2778-2779 (1991) (considering *Wilson* principles en route to creating federal common law limitations rules for certain securities actions); *Howlett By and Through Howlett v. Rose*, ____ U.S. ____, 110 S.Ct. 2430, 2444 (1990) (drawing on *Wilson* principles in rejecting Florida state court incursions on the rights of § 1983 litigants in those courts); *Hardin v. Straub*, ____ U.S. ____, 109 S.Ct. 1998, 2000-2003 (1989) (applying *Wilson* principles to determine whether certain tolling rules applicable to Michigan's personal injury statute of limitations could be applied in § 1983 actions); *Felder v. Casey*, ____ U.S. ____, 108 S.Ct. 2302, 2307-2315 (1988) (applying *Wilson* principles to determine whether Wisconsin notice of claim provision could be applied so as to limit § 1983 litigants' rights in actions against Wisconsin public officials brought in Wisconsin state court).

residual statute for personal injury actions. 488 U.S. at ____, 109 S.Ct. at 582.

In so ruling, the Court applied the *Wilson* principles to reject the argument that courts should borrow the narrower intentional tort limitations period rather than the broader general or residual limitations period. *The rationale for that decision is instructive here:*

> Petitioners' argument that courts should borrow the intential tort limitations period because intentional torts are most analogous to § 1983 claims fails to recognize the enormous practical disadvantages of such a selection. Moreover, this analogy is too imprecise to justify such a result. In *Wilson, we expressly rejected the practice of drawing narrow analogies between § 1983 claims and state causes of action.* 471 U.S., at 272, 105 S.Ct., at 1945. We explained that the Civil Rights Acts provided:
>
> > "[a] unique remedy mak[ing] it appropriate to accord the statue 'a sweep as broad as its language.' Because the § 1983 remedy is one that can 'override certain kinds of state laws,' *Monroe v. Pape*, 365 U.S. 167, 173, 81 S.Ct. 473, 477,5 L.Ed.2d 492 (1961), and is, in all events, 'supplementary to any remedy any State might have,' *McNeese v. Board of Education*, 373 U.S. 668, 672, 83 S.Ct. 1433, 1435, 10

> L.Ed.2d 622 (1963), it can have no precise counterpart in state law. *Monroe v. Pape*, 365 U.S., at 196, n.5, 81 S.Ct., at 488, n.5 (Harlan, J., concurring). Therefore, it is 'the purest coincidence,' *ibid*, when state statutes or the common law provide for equivalent remedies; any analogies to those causes of action are bound to be imperfect." *Ibid*. (footnotes omitted).

The intentional tort analogy is particularly inapposite in light of the wide spectrum of claims which § 1983 has come to span. In *Wilson*, we noted that claims brought under § 1983 include:

> "discrimination in public employment on the basis of race or the exercise of First Amendment rights, discharge or demotion without procedural due process, mistreatment of schoolchildren, deliberate indifference to the medial needs of prison inmates, the seizure of chattels without advance notice or sufficient opportunity to be hear." *Id.*, 471 U.S., at 273, 105 S.Ct., at 1945 (footnotes omitted).

> . . .Given that so many claims brought under §1983 have no precise state-law analog, applying the statute of limitations for the limited category of intentional torts

> would be inconsistent with § 1983's broad scope.
>
> We accordingly hold that where state law provides multiple statutes of limitations for personal injury actions, courts considering § 1983 claims should borrow the general or residual statute for personal injury statutes.

109 S.Ct. at 580-582 (emphasis added, footnotes omitted).

d. The Court's Neglect Of The Wilson/Okure Line Of Cases.

In this case, the Court of Appeals failed to follow out the implications of the Wilson/Okure line of cases because it forgot that Brummett's § 1983 claim was not to be characterized differently, and evaluated differently, because Brummett's case was based on a particular legal theory labelled malicious prosecution; forgot to characterize § 1983 claims *broadly*—as a personal injury claims; and forgot to assure that any characterization that was applied to § 1983 was consistent with federal law or policy.

Instead, the Court of Appeals—comforted perhaps by pre-*Wilson* cases[6] and by post-*Wilson*

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[6] *Wheeler v. Cosden Oil & Gas Co.*, 734 F.2d 254 (5th Cir. 1984), *modified*, 744 F.2d 1131 (5th Cir. 1984); *Venegas v. Wagner*, 704 F.2d 1144, 1146 (9th Cir. 1983); *Singleton v. City of New York*, 632 F.2d 185, 198 (2d Cir. 1980), *cert. denied*, 450 U.S. 920 (1987); *Morrison v. Jones*, 551 F.2d 939, 940-941 (4th Cir. 1977); *Sullivan v. Choquette*, 420 F.2d 674, 676 (1st Cir. 1970).

federal court opinions that either missed the implications of *Wilson* entirely[7] or misinterpreted them[8]—slipped into the pre-*Wilson* habit of narrowly characterizing § 1983 claims in terms of the legal theories urged by the § 1983 plaintiff. As a result, the Court failed to assure that its § 1983 characterizations were broad enough to be consistent with federal law or policy; disserved the very federal interest in uniformity, in certainty, and in the minimization of unnecessary litigation that the *Wilson/Okure* line of cases had asked the courts to serve; and so undermined the statute itself.

3. Had The Court Of Appeals Given Due Regard To The *Wilson/Okure* Line Of Cases, And Correctly Analyzed The § 1983 Actionability Of Malicious Prosecutions, It Would Have Reached A Different Result.

Had the Court's opinion analyzed the issue in the terms required by the *Wilson/Okure* line of cases, and correctly interpreted the Fifth Circuit cases regarding the § 1983 actionability of malicious prosecution, it would have concluded that:

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7 *Robinson v. Maruffi*, 895 F.2d 649, 654-655 (10th Cir. 1990); *Torres v. Superintendent of Police*, 893 F.2d 404, 409 (1st Cir. 1990); *Rose v. Bartle*, 871 F.2d 331, 349 (3d Cir. 1989).

8 *McCune v. City of Grand Rapids*, 842 F.2d 903, 907 (6th Cir. 1988).

1. While this Court reads *Wheeler* to hold that any malicious prosecution would be actionable under § 1983, *Wheeler* need not be read so broadly;

2. A malicious prosecution action is actionable under § 1983, if at all, only when a Plaintiff can allege and prove that his particular personal injury involved a deprivation of *federal* rights by public officials;

3. The favorable termination of an underlying criminal proceeding is not an essential element of a § 1983 action—even a § 1983 action couched in the language of malicious prosecution;[9]

4. Under *Wheeler*, a § 1983 action accrued when Plaintiff Brummett knew or should have known that he had suffered a § 1983 injury, or had sufficient information to know that he had been injured—that is, it accrued when Brummett knew or should have known that he had been prosecuted without probable cause, or had sufficient information to know that he had been prosecuted without probable cause;

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9 The claim that favorable termination is an essential element is not only an unlawful and inappropriate extension of *Wheeler*, it is a violation of the Supreme Courts "governing principle: that, in analyzing § 1983 issues created by a gap, "we borrow only what is necessary to fill the gap left by Congress." *West v. Conrail*, ____ U.S. ____, 107 S.Ct. 1538, 1542 n.6 (1987) (declining to borrow certain service requirements in borrowing a federal statute of limitations).

5. Brummett knew or should have known that he had been prosecuted without probable cause in July 1, 1983, when he was advised that he had been indicted by the Johnson County Grand Jury for hindering a secured creditor in violation of TEX. PENAL CODE § 32.33. Alternatively, Brummett had sufficient information on that day to know that he had been prosecuted without probable cause;

6. Because Brummett's cause of action accrued on July 1, 1983, more than two years before he filed suit, his action was barred by the applicable statute of limitations, TEX. CIV. PRAC. & REM. CODE § 16.003.

A correct view of the law therefore requires this Court to reverse the Court of Appeals decision and affirm Judge Sanders' summary judgment for the Private Defendants.

C. THE UNITED STATES COURT OF APPEALS DECISION WILL CREATE SIGNIFICANT PRACTICAL PROBLEMS FOR THE FEDERAL COURTS.

It is ironic that the Court of Appeals simultaneously opens the doors of the federal courts to all malicious prosecution claimants, without regard for whether such malicious prosecutions violate federal rights, while at the same time it creates a condition precedent to a § 1983 action (favorable termination) that could well close the federal courts to a plaintiff (with real

constitutional grievances) for a truly indefinite number of years.[10]

Moreover, since the Court of Appeals' opinion will result in the virtually automatic granting of a Rule 12(b)(6) motion to dismiss a plaintiff's § 1983 "malicious prosecution" action in the absence of a favorable termination, a plaintiff having § 1983 grievances, *e.g.*, false arrest, false imprisonment, or brutality claims, in addition to a § 1983 claim premised on "malicious prosecution: would likely be required to file *two* separate federal lawsuits: one to insure that limitations do not run on his or her non-malicious prosecution claims; and one, perhaps filed years later, after a "favorable termination," to insure that limitations do not run on a malicious prosecution claim that allegedly accrued years later. Of course, the sequential filing of two such federal § 1983 actions would not bar an

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10 This point is not an insignificant one. The Supreme Court has correctly taken an antagonistic approach to laws or rules that circumscribe the § 1983 cause of action or impede a § 1983 plaintiff's access to the Courts. *See, e.g., Howlett By and Through Howlett v. Rose*, ____ U.S. ____, 110 S.Ct. 2430, 2444 (1990) (rejecting the application of a state law sovereign immunity defense in § 1983 actions brought in state court as, in part, a violation of the Supremacy clause); *Felder v. Casey*, ____ U.S. ____, 108 S.Ct. 2302, 2309 (1988) (rejecting a Wisconsin notice of claim provision that created a condition precedent to the filing of § 1983 action: *Martinez v. California*, 444 U.S. 277, 284, 100 S.Ct. 553, 558 (1980) (rejecting a California state immunity law that provided immunities to state officials in excess of those provided by federal law).

additional suit in state court brought pursuant to the state common law of malicious prosecution.

The Court of Appeals' holding creates other problems as well. It creates a rule of repose that is so indefinite as to provide no repose to potential defendants. It leaves defendants vulnerable to multiple and vexatious actions which, if filed in different courts and jurisdictions, or even in the same court at different times, can and will have inconsistent results. It raises new questions that seriously threaten any effort to create either national or in-state uniformity; questions as to what other elements of the state tort action (or its defenses) will be imported into the federal action, what law will provide and define those elements; and so on, and so on, and so on.

D. THE UNITED STATES COURT OF APPEALS HAS DECIDED IMPORTANT QUESTIONS OF LAW WHICH HAVE NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT

The four questions raised by this petition are questions that should be answered by this Court, so that they may be answered uniformly in the federal and state[11] courts of the land.

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[11] *See, e.g. Patsy v. Board of Regents of Florida*, 457 U.S. 496, 507, 102 S.Ct. 2557, 2563 (1982) (recognizing that state courts have concurrent jurisdiction over actions brought pursuant to 42 U.S.C. § 1983).

In *Cerbone v. Conway*, 479 U.S. 84, 107 S.Ct. 390 (1986), 758 F.2d 46 (2d Cir. 1985), *cert. granted*, 474 U.S. 1100, 106 S.Ct. 878 (1986) *writ dism'd as improvidently granted*, this Court agreed, in substance, to hear the first two of the questions posed by this petition. *Compare Cerbone v. Conway*, 54 U.S.L.W. 3015 (July 16, 1985) (identifying six questions in which review was requested) with *Cerbone v. Conway*, 474 U.S. 1100, 106 S.Ct. 878 (1986) (granting review on four of the six questions). The Court subsequently declined to consider those issues when it dismissed the writ as improvidently granted. Six years later, the law remains confused, and the courts are as much in need of instruction on those issues as they were six years before.

The second pair of Plaintiff's four questions also require answers by this Court—if the *Wilson/Okure* rationalization of the principles to be applied in resolving § 1983 limitations issues is to continue.

VI. CONCLUSION

For the reasons stated, the writ of certiorari should be granted and the Court of Appeals' decision reversed.

In the alternative, if this Court elects not to address the issues raised by this petition at this time, this Court should grant the petition, vacate the Court of Appeals' decision, and remand the case for

consideration in light of the principles set forth in *Collins v. Harker Heights*, ____ U.S. ____, 1992 WL32006 (February 26, 1992).

In *Collins*, a decision that was not available to the Court of Appeals at the time the *Brummett* opinion issued, this Court rejected the Fifth Circuit's efforts to import into § 1983, an "abuse of governmental power" element that was foreign to that statute. Instead, the *Collins* court focused the discussion on the statutory language, on the constitutional fundamentals, and on the clear imperative in § 1983 that that statute is to be interpreted to reflect the statute's concern with federal rights, and not interpreted to impose federal duties that are analogous to those traditionally imposed by state tort law." 1992 WL32006 at WL Page 7.

Had the *Brummett* Court of Appeals analyzed the case before it in the manner in which the *Collins* court analyzed its § 1983 claims, no "favorable termination" element would have been imported into either § 1983 or the law of the Fifth Circuit—and no malicious prosecution claims would be tolerated that could not pass full constitutional muster.

Respectfully submitted,

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APPENDICES

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 90-1671

JAY BRUMMETT,
Plaintiff-Appellant,

v.

JIMMY CAMBLE, et al.,
Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Texas

ON PETITIONS FOR REHEARING
(December 20, 1991)

Before JONES and DUHE, Circuit Judges, and WALTER*, District Judge.

PER CURIAM:

IT IS ORDERED that the petitions for rehearing filed in the above entitled and numbered cause be and the same are hereby DENIED.

ENTERED FOR THE COURT:

/s/ Edith H. Jones
United States Circuit Judge

*District Judge of the Western District of Louisiana, sitting by designation.

APPENDIX B

Jay BRUMMETT, Plaintiff-Appellant,

v.

Jimmy CAMBLE, Jim Boles, Doug Sanders, Dan Boulware, John R. Maclean, First State Bank of Cleburne, Texas, and Johnson County, Texas, Defendants-Appellees.

No. 90-1671.

United States Court of Appeals,
Fifth Circuit.

Nov. 14, 1991.

Before JONES and DUHE, Circuit Judges, and Walter, [1] District Judge.

EDITH H. JONES, Circuit Judge:

Appellant Jay Brummett filed suit against numerous public and private defendants alleging that they conspired to prosecute him maliciously in violation of 42 U.S.C. § 1983. The trial court dismissed the public defendants from the suit on immunity grounds and granted summary judgment for the private defendants on limitations grounds. We disagree that the statute of limitations bars the case against the private defendants, and we conclude that it is premature to rule on the county's liability, but we generally affirm dismissal of the public defendants.

I.

[1] District Judge of the Western District of Louisiana, sitting by designation.

The gist of Brummett's compliant is that he was prosecuted under an inapplicable Texas statute for not repaying a bank loan. In January 1982, Brummett borrowed $33,445.80 from First State Bank of Cleburne, Texas ("FSB"), collateralized by the equipment and inventory of his retail stereo business. Fifteen months later, Brummett advised FSB loan officer Doug Sanders that his financial condition was rapidly deteriorating, and he could no longer make the payment due under the note. When Sanders visited Brummetts' store with Jim Boles, an FSB collection officer, to survey the inventory, Brummett informed them that it had been sold to customers in the normal course of business.

After Brummett's business closed in April 1983, Sanders asked him and his wife to sign a new note. Brummett refused. Resorting to standard loan collection procedures, the bank sent a demand letter to Brummett through its attorney. This was followed by a notice that the bank had elected to turn the matter over to the district attorney's office. The same day, Brummett received a letter from then County Attorney Dan Boulware, advising Brummett that he was subject to indictment for "removing" the collateral that secured his debt to FSB—a felony violation of Tex.Penal Code § 32.33.

Brummett appeared before a Johnson County grand jury and testified that no crime had taken place; he stated that, as FSB knew and agreed, he had sold his inventory in the normal course of business. At this point, Boulware angrily stated: "O.K., Jay, let's get the facts straight. You mortgaged property, you sold it, you admit it, and that puts you right in the middle of this statute and that's the facts." The Grand Jury then indicted him for "removing" property with intent to hinder

enforcement of FSB's security interest. Brummett was never incarcerated for this charge. Rather, after almost three years of court appearances, the charge against Brummett was dismissed on April 7, 1986 for insufficient evidence.

Brummett filed suit on March 26, 1987, alleging malicious prosecution in violation of state law and 42 U.S.C. § 1983. Named as defendants were prosecutors Boulware and John R. Maclean, Johnson County, FSB, Boles, Sanders, and FSB president Jimmy Camble. The trial court dismissed Brummett's original complaint for lack of specificity, but it allowed him to replead in accordance with *Elliott v. Perez*, 751 F.2d 1472, 1479 n. 20 (5th Cir. 1985). Brummett responded with an Amended Complaint alleging that Maclean—then district attorney of Johnson County, now a state district judge—was a member of the FSB board of directors, as well as a stockholder of FSB, when FSB decided to pursue a criminal prosecution against Brummett. Brummett also alleged that Boulware—then county attorney, now district attorney, for Johnson County—was a major stockholder of FSB. Brummett contended, based on Maclean and Boulware's personal interests in FSB, that the two prosecutors conspired with FSB employees to indict him illegally by convincing the Grand Jury that there was evidence that a crime had been committed when in fact there was none. Brummett alleged that a violation of § 32.33 requires that the collateral must be transferred outside the state of Texas. Brummett asserted that the defendants had absolutely no evidence to support such an allegation and, therefore, they pursued the criminal prosecution against him in bad faith and without probable cause. The trial court held that these allegations stated a claim

against the private defendants, but it ordered dismissal of the public defendants, Maclean, Boulware and Johnson County based on official immunity.

Camble, Boles, Sanders, and FSB then moved for summary judgment. Brummett filed a detailed response and also attempted to depose Boulware, Maclean, and one of their assistants. His efforts were thwarted by the former prosecutors' refusal to testify. The district court referred the dispute to a magistrate judge, who ultimately ruled that depositions were proper. This ruling was appealed to the district court but never acted upon. In the meantime, the district court granted summary judgment solely on the ground that Brummett had filed his § 1983 claim outside the applicable limitations period. The district court then dismissed Brummett's pendent state law malicious prosecution claim. Brummett appealed.

II.

The malicious prosecution can form the basis of a § 1983 claim is not disputed by the defendants.[2] Instead, Brummett

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[2] Our most recent cases have assumed that malicious prosecution violates § 1983. *See Thomas v. Kippermann*, 846 F.2d 1009 (5th Cir. 1989); *Hand v. Gary*, 838 F.2d 1420, 1426 (5th Cir. 1988); *Wheeler v. Cosden Oil & Chemical Co.*, 734 F.2d 254 (5th Cir. 1984). Not long ago, however, our court had held that torts of abuse of process (of which malicious prosecution is a branch) were not encompassed within § 1983. *Cook v. Houston Post*, 616 F.2d 791, 794 (5th Cir. 1980) (malicious prosecution); *Beker Phosphate Corp. v. Muirhead*, 581 F.2d 1187 (5th Cir. 1978); *Curry v. Ragan*, 257 F.2d 449 (5th Cir. 1956).

Mysteriously, other circuit courts seem also to have flip-flopped on the constitutional tort status of malicious prosecution. *Compare Torres v. Superintendent of Police of Puerto Rico*, 893 F.2d 404, 408 (1st Cir. 1990) (§ 1983 includes malicious prosecution), with *Cloutier v. Town of Epping*, 714 F.2d 1184, 1190 (1st Cir. 1983 (no § 1983 malicious prosecution action), and with *Sullivan v. Choquette*, 420 F.2d 674 (1st

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challenges the district court's dismissal of Boulware and Maclean on immunity grounds. He argues that Boulware and Maclean "acted when there was an actual conflict of interest" and, therefore, they are not shielded from a § 1983 suit. Alternatively, Brummett contends that even if Boulware and Maclean are entitled to prosecutorial immunity, they are not immune as owners/stockholders/directors of FSB. We reject these arguments.

(continued from previous page)
Cir. 1969), *cert. denied*, 398 U.S. 904, 90 S.Ct. 1691, 26 L.Ed.2d 62 (1970). *Also compare Duncan v. Peck*, 844 F.2d 1261, 1267 (6th Cir. 1988), with *Dunn v. State of Tenn.*, 697 F.2d 121 (6th Cir. 1982) (no § 1983 malicious prosecution action unless plaintiff was deprived of specific constitutional right). Still other circuits have consistently held that here is a § 1983 action against malicious prosecution; *Inada v. Sullivan*, 523 F.2d 485, 487-88 (7th Cir. 1975); *White v. Frank*, 855 F.2d 956, 961 n.5 (2d Cir. 1988); *Losch v. Borough of Parkesburg, Pa.*, 736 F.2d 903, 907 (3d Cir. 1984); *Morrison v. Jones*, 551 F.2d 939 (4th Cir. 1977).

The Ninth Circuit has held that there is no § 1983 malicious prosecution claim unless the prosecution is conducted with the intent to deprive a person of equal protection or other enumerated constitutional rights. *Usher v. City of Los Angeles*, 828 F.2d 556, 561-62 (9th Cir. 1987).

Only Judge Gee's opinion in *Wheeler, supra*, has endeavored to explain why a malicious prosecution might always violate the constitution so as to be actionable under § 1983, and he founded that conclusion with admitted tentativeness on the implied constitutional right to have charges brought only upon probable cause. Whether *Wheeler* would survive the Supreme Court's recent attempt to predicate constitutional rights on a more textual footing is arguable. *See, e.g., Wilson v. Seiter*,—U.S.—, 111 S.Ct. 2321, 115 L.Ed.2d 271 (1991). *Wheeler* would, however, clearly survive to the extent that a malicious prosecution caused a plaintiff's pretrial detention or otherwise infringed specific constitutional guarantees. The Supreme Court may have to decide this question someday. *See, e.g., Cerbone v. Conway*, 479 U.S. 84, 107 S.Ct. 390, 93 L.Ed.2d 325 (1986), *writ dismissed as improvidently granted*.

Prosecutors are absolutely immune from liability under § 1983 for their conduct in "initiating a prosecution and in presenting the State's case," because that conduct is "intimately associated with the judicial phase of the criminal process." *Imbler v. Patchman*, 424 U.S. 409, 430-31, 96 S.Ct. 984, 995, 47 L.Ed.2d 128 (1976). *See also Burns v. Reed*,—U.S.—, 111 S.Ct. 1934, 1939, 114 L.Ed.2d 547 (1991).

Brummett argues, however, that this rule does not apply where a prosecutor faces an actual conflict of interest. Citing *Beard v. Udall*, 648 F.2d 1264, 1271 (9th Cir. 1981), Brummett contends that a prosecutor who has a personal interest in filing charges that he knows to be baseless is acting "beyond the scope of his authority and thus [he] does not enjoy absolute immunity." *Beard* is inapposite, however, for three reasons. First, the Ninth Circuit explicitly overruled the decision in *Ashelman v. Pope*, 793 F.2d 1072, 1077-78 (9th Cir. 1986) (en banc), stating the immunity should not be affected by the motives with which a prosecutor's acts are performed. *Id.* at 1077. Second, *Beard* is not the law in this circuit. In *Holloway v. Walker*, 765 F.2d 517, 522-23 (5th Cir. 1985), *cert denied*, 474 U.S. 1037, 106 S.Ct. 605, 88 L.Ed.2d 583 (1985)—a case involving allegations of bribery against a judge—this court observed that the mere fact that a judge undertakes to perform a judicial act motivated by *"personal interest*, bad faith, or outright malevolence" does not destroy his immunity. Third, absolute immunity is justified and defined by the governmental functions it protects and serves, not by the motives with which a particular officer performs those functions. *See Cleavinger v. Saxner*, 474

U.S. 193, 200-01, 106 S.Ct. 496, 500, 88 L.Ed.2d 507 (1985) (exemption of judges from civil liability cannot be affected by the motives with which their judicial acts are performed); *Rykers v. Alford*, 832 F.2d 895 (5th Cir. 1987) (absolute immunity shelters prosecutors even when they act maliciously, wantonly, or negligently). Inasmuch as the purposes of extending absolute immunity to prosecutors are to avoid deflecting the prosecutor's energies from his public duties and to encourage the independent exercise of judgment required by his office, *Imbler*, 424 U.S. at 425, 96 S.Ct. at 992, foreclosing that immunity upon allegations of a conflict of interest would seriously undermine such policies. The district court correctly recognized the prosecutors' absolute immunity, as prosecutors, from Brummett's suit.

Alternatively, Brummett alleged claims against Maclean in his individual capacity as a member of the First State Bank's Board of Directors and against Boulware in his individual capacity as stockholder/legal counsel for First State Bank. The question thus posed is whether, if Boulware and Maclean acted in their respective capacities as shareholder/counsel or director of FSB to spur the filing of criminal charges against Brummett, they shed their prosecutorial immunity.

This is an interesting question. One line of authority holds that even though a judge or prosecutor is bribed—the quintessential act in self-interest—he is absolutely immune for acts performed in the scope of the judicial or prosecutorial function. *See Sparks v. Duval County Ranch Co., Inc.*, 604 F.2d 976 (5th Cir. 1979) (en banc), aff'd., *Dennis v. Sparks*, 449 U.S.24, 101 S.Ct. 183, 66 L.Ed.2d 185 (1980). According to another line of authority, however, he does not

enjoy absolute immunity for actions undertaken outside the scope of judicial or prosecutorial action. Thus, it has been held that a judge may be sued for dismissing an employee. *Forrester v. White*, 484 U.S. 219, 227-29, 108 S.Ct. 538, 544-45, 98 L.Ed.2d 555 (1988) (judges are not absolutely immune from liability and damages for administrative, legislative, or executive functions that judges may occasionally be assigned by law to perform). A prosecutor, moreover, may be sued for giving erroneous legal advice to the police. *Burns v. Reed*,—U.S.—, 111 S.Ct. 1934, 1943, 114 L.Ed.2d 547 (1991).

On balance, we believe that prosecutorial immunity must be recognized notwithstanding Brummett's allegations that Boulware and Maclean fostered charges against him in a private as well as official capacity. Our justification is the functional approach to immunity, which considers and protects certain acts of the judge or prosecutor regardless of their motives. To hold that Boulware and Maclean wore two hats when opting to press charges against Brummett is no different than suggesting that they were bribed or overcome by self-interest in the decision-making process: it is a conclusion that the FSB "hat" governed the decision to perform what was nonetheless a prosecutorial function. Thus, the dual capacity argument focuses impermissibly on the officials' motivations. Moreover, the dual hat theory is a very loose concept that furnishes no rule of thumb for prosecutorial conduct; by this very fact it would stymie prosecutorial independence as the courts attempted to flesh out its ramifications. We perceive little good coming from such a theory and the potential for considerable mischief. The function exercised here was

clearly protected by absolute immunity, and it is to the function that we defer. The district court properly dismissed Boulware and Maclean.

III.

The district court also dismissed Johnson County on the ground that Brummett's claims were barred by the prosecutors' absolute immunity. Defendants argue that dismissal was proper because "counties cannot be held liable when their prosecutors are entitled to prosecutorial immunity."

Although this is an appealing argument, it is also novel. The Supreme Court approved municipal liability for § 1983 violations notwithstanding the qualified immunity defense of the individual municipal officers. *Owen v. City of Independence*, 445 U.S. 622, 638, 100 S.Ct. 1398, 1409, 63 L.Ed.2d 673 (1980); *see also Hernandez v. City of Lafayette*, 643 F.2d 1188, 1196 (5th Cir. 1981), cert. denied, 455 U.S. 907, 102 S.Ct. 1251, 71 L.Ed.2d 444 (1982) (city potentially liable for § 1983 violation committed by mayor with absolute legislative immunity). Johnson County contends the situation is different because its County and District Attorneys, Boulware and Maclean, enjoyed absolute rather than qualified immunity. Perhaps so. Nevertheless, discretion seems to be the better part of valor here, for we, as well as the district court, are far from rendering a decision on the county's liability. Such a decision would follow conclusions, among others, that (1) the prosecutors' actions amounted to a local custom or policy[3]; (2) the county and district attorneys are

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[3] *See, e.g., Raysor v. Port Authority of New York & New Jersey*, 768 F.2d 34, 38 (2d Cir. 1985) (no custom or policy).

county rather than state officers under Texas law; and (3) there was an actionable § 1983 conspiracy between the private defendants and the prosecutors. So few § 1983 malicious prosecution cases have survived to entry of judgment that, based on their histories, we are reluctant to rule on what is at this stage an abstract, albeit important, proposition of potential municipal liability. Accordingly, the judgment dismissing Johnson County is vacated for further consideration in light of later events in the trial court.

IV.

Having disposed of the issues with respect to the public defendants, we turn to consider the district court's conclusion that the statute of limitations barred this action against the private defendants.

Brummett agrees that the applicable limitations statute is Tex.Rev.Civ.Prac. & Rem.Code Ann. § 16.003, which requires a suit to be commenced within two years after the cause of action accrued. *See Wilson v. Garcia*, 471 U.S. 261, 267-68, 105 S.Ct. 1938, 1942, 85 L.Ed.2d 254 (1985) (federal courts must select the most appropriate state statute of limitations for § 1983 claims); *Helton v. Clements*, 832 F.2d 332, 334 (5th Cir. 1987); *Peter Henderson Oil Co. v. City of Port Arthur*, 806 F.2d 1273, 1275 (5th Cir. 1987). He contends, however, that his malicious prosecution claim did not accrue on July 1, 1983 when he was indicted, as found by the district court, but rather on April 9, 1986, when the state prosecution terminated in his favor. Accordingly, Brummett insists that the instant suit, filed on March 26, 1987, is not time-barred.

The root of this problem lies in the undefined overlap between state common law tort actions and federal civil rights actions brought pursuant to § 1983. Not every common law tort committed by state or local government officials is actionable under § 1983. *Baker v. McCollan*, 443 U.S. 137, 140, 99 S.Ct. 2689, 2692, 61 L.Ed.2d 433 (1979). Relying on this truth, defendants contend that Brummett "pins his hopes for reversal on the deceptively simple notion" that the limitations period applicable to a § 1983 malicious prosecution claim "cannot begin to run until it would begin to run on a malicious prosecution claim brought pursuant to state law." This statement mischaracterizes Brummett's position, however, for he contends that favorable termination is an essential element of a § 1983 malicious prosecution claim and, therefore, the cause of action does not accrue until that element has been established. We agree with Brummett.

In order to sustain the district court's conclusion that a malicious prosecution claim under § 1983 accrues prior to favorable termination of the underlying criminal proceedings, one of two propositions must be true: (1) favorable termination is not an element of a § 1983 malicious prosecution claim; or (2) a § 1983 claim may accrue *before* all of its elements are established. Neither proposition can withstand scrutiny.

As has been said, the federal courts have repeatedly held that common law and state tort law do not define that scope of liability under § 1983. AS § 1983 complaint must, however, allege a *wrong* to the plaintiff. The essence of a malicious prosecution claim is a groundless prosecution. At common law, a conviction alone is sufficient to establish probable cause for a prosecution. *See Dunn v. Tennessee*, 697 F.2d 121,

127 (6th Cir. 1982), *cert. denied sub nom., Wylie v. Dunn*, 460 U.S. 1086, 103 S.Ct. 1778, 76 L.Ed.2d 349 (1983). Hence, the common law requires that the underlying criminal proceeding must terminate in the plaintiff's favor.

Absent a similar requirement of "favorable termination" for the constitutional tort of malicious prosecution, a plaintiff could state a § 1983 claim even in cases in which he was ultimately convicted. In such cases, the federal courts would be forced to permit defendants to relitigate the merits of their criminal prosecutions via § 1983 despite the state court conviction. Such a rule, which poses the prospect of harassment, waste, and endless litigation, conflicts with the most basic principles of federalism.

Faced with this specter of unwarranted federal intrusion into state affairs, the federal courts have adopted the common law rule that termination of the underlying criminal proceeding in favor of the accused is an essential element of a § 1983 malicious prosecution claim. *See, e.g., Torres v. Superintendent of Police*, 893 F.2d 404, 409 (1st Cir. 1990); *Rose v. Bartle*, 871 F.2d 331, 349 (3d Cir. 1989); *McCune v. City of Grand Rapids*, 842 F.2d 903, 907 (6th Cir. 1988); *Venegas v. Wagner*, 704 F.2d 1144, 1146 (9th Cir. 1983); *Singleton v. City of New York*, 632 F.2d 185, 198 (2d Cir. 1980), *cert. denied*, 450 U.S. 920, 101 S.Ct. 1368, 67 L.Ed.2d 347 (1981); *Morrison v. Jones*, 551 F.2d 939, 940-41 (4th Cir. 1977); *Sullivan v. Choquette*, 420 F.2d 674 (1st Cir. 1969), *cert denied*, 398 U.S. 904, 90 S.Ct. 1691, 26 L.Ed.2d 62 (1970). Finding nothing in the common law rule that undermines the policies fostered by § 1983, we likewise hold that a plaintiff may not state a claim under § 1983 for

malicious prosecution absent proof that the prosecution terminated in his favor.

The question remains whether a § 1983 plaintiff should be required to file suit prior to such termination. Although state law supplies the limitations period for § 1983 claims, federal law determines when the cause of action accrues. *Board of Regents v. Tomanio,* 446 U.S. 478, 483-86, 100 S.Ct. 1790, 1794-86, 64 L.Ed.2d 440 (1980); *Helton v. Clements,* 832 F.2d 332, 334-35 (5th Cir. 1987). In this circuit, a § 1983 claim accrues when the plaintiff "becomes aware that he has suffered an injury or has sufficient information to know that he has been injured." *Helton,* 832 F.2d at 332 (citing *Rubin v. O'Koren,* 621 F.2d 114, 116 (5th Cir. 1980), *on reh'g,* 644 F.2d 1023 (5th Cir. 1981), and *Lavellee v. Listi,* 611 F.2d 1129, 1131 (5th Cir. 1980)). Relying on this standard, defendants insist that although a *state law* malicious prosecution claim does not accrue until the underlying criminal proceeding is terminated in the plaintiff's favor, a § 1983 malicious prosecution claim accrues when the plaintiff is indicted.

The perverse result of such a rule is that claimants would have to file § 1983 suits before they even know they have a cause of action, i.e., before a prosecution has ended favorably to them. Why defendants would advocate the filing of premature lawsuits defies our understanding as well as the uniform precedent of other circuit courts. *See, e.g., Robinson v. Moruffi,* 895 F.2d 649, 654-55 (10th Cir. 1990); *Rose v. Bartle,* 871 F.2d 331, 348-49 (3d Cir. 1989); *McCune v. City of Grand Rapids,* 842 F.2d 903, 907 (6th Cir. 1988); *Venegas v. Wagner,* 704 F.2d 1144, 1146 (9th Cir. 1983); *Singleton*

v. City of New York, 632 F.2d 185, 194-95 (2d Cir. 1980), *cert. denied,* 450 U.S. 920, 101 S.Ct. 1368, 67 L.Ed.2d 347 (1981); *Morrison v. Jones,* 551 F.2d 939, 940-41 (4th Cir. 1977); *Sullivan v. Choquette,* 420 F.2d 674 (1st Cir. 1969), *cert. denied,* 398 U.W. 904, 90 S.Ct. 1691, 26 L.Ed.2d 62 (1970). *See also Wheeler,* 734 F.2d at 254. The cases cited by the defendants and the district court in support of a contrary holding involve § 1983 claims other than those for malicious prosecution. *See, e.g., Helton,* 832 F.2d at 332; *Rubin,* 621 F.2d at 116; *Lavellee,* 611 F.2d at 1131. We reject the defendants' accrual theory.

Brummett's suit was filed less than two years after the underlying criminal proceeding terminated in his favor. Accordingly, his § 1983 malicious prosecution claim was timely filed[4].

V.

Defendants argue that if the district court's entry of summary judgment cannot be sustained on limitations grounds, it may be upheld on the basis that Brummett failed to establish that any of the private defendants acted "under color" of law. As the district court noted, a private person does not act under color of law simply because he invokes state authority. *Auster Oil & Gas, Inc. v. Stream,* 764 F.2d 381, 388 (5th Cir. 1985), *cert. denied,* 488 U.S. 848, 109 S.Ct. 129, 102 L.Ed.2d 102 (1988). The color-of-law requirement is not satisfied by alleging that an individual filed a criminal

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[4] In addition to malicious prosecution, Brummett raised five other ß 1983 claims in his Amended Complaint. He apparently concedes that these claims are barred by limitations and has abandoned them on appeal.

complaint with prosecuting authorities. *Daniel v. Ferguson,* 839 F.2d 1124, 1130 (5th Cir. 1988); *Sims v. Jefferson Downs Racing Ass'n, Inc.*, 778 F.2d 1068, 1078-79 (5th Cir. 1985).

Brummett obviously recognized this rule, for he alleged not merely that the private defendants had filed a criminal complaint against him, but that they had corruptly conspired with prosecutors to obtain an indictment from the Grand Jury. Such a conspiracy theory is sufficient to establish that the private defendants acted under color of law within the meaning of § 1983. *Dennis v. Sparks,* 449 U.S.24, 27, 101 S.Ct. 183, 186, 66 L.Ed.2d 185 (1980); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 150-52, 90 S.Ct. 1598, 1604-06, 26 L.Ed.2d 142 (1970); *Smith v. Winter,* 782 F.2d 508, 512 (5th Cir. 1986). This is true even if the private defendants are alleged to have conspired with one who has absolute, as opposed to qualified, immunity. *See Dennis, id.* 449 U.S. at 27, 101 S.Ct. at 186 (private co-conspirators of a judge held subject to § 1983 damages action); *Turner v. Upton County,* 915 F.2d 133, 137 n.6 (5th Cir.) (parties to a conspiracy need not be state actors for liability to attach to them—"even if one of the co-conspirators is absolutely immune from liability for his own actions as a participant"), *cert. denied,*—U.S.—, 111 S.Ct. 788, 112 L.Ed.2d 850 (1991).

Defendants argue, however, that there is no evidence to support a conspiracy theory in this case. Although we have jurisdiction to address this claim, it has not been addressed by the district court, and the more prudent course is to leave it to the district court on remand. Brummett filed a substantial response to the defendants' motion for summary judgment.

Moreover, he filed a Fed.R.Civ.P. 56(f) motion requesting permission to depose Boulware and Maclean in connection with his opposition to the motion. Although the magistrate judge concluded that such depositions were proper, the district court never ruled on this motion. We are aware of no rule that generally exempts prosecutors from the normal obligations of responding as witnesses if they have information material to a civil proceeding. Indeed, in a similar context, the Supreme Court held that judges, while absolutely immune from § 1983 suits, are not excused from "responding as witnesses when [their] co-conspirators are sued." *Dennis,* 449 U.S. at 30, 101 S.Ct. at 188. Accordingly, Brummett should have had the benefit of the prosecutors' deposition testimony if he needed it to prepare his response to the defendants' motion for summary judgment. We therefore express no view on the sufficiency of the existing summary judgment evidence.

VI.

The judgment of the district court dismissing Boulware and Maclean on the basis of their immunity is AFFIRMED. The judgment is VACATED insofar as it dismissed Johnson County pursuant to Rule 12(b)(6) and granted summary judgment for the private defendants,[5] and the case is REMANDED for proceedings consistent with this opinion.

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5 In light of this disposition, we leave the question whether Brummett's state law malicious prosecution claim should be reinstituted as a pendent claim to the sound discretion of the district court.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

JAY BRUMMETT,	§	
	§	
Plaintiff,	§	
	§	
v.	§	**Civil Action No.**
	§	**CA3-87-0789-H**
JIMMY CAMPBELL, et al.,	§	
	§	
	§	
Defendants.	§	

ORDER

Before the Court is Plaintiff's Motion for New Trial and Reconsideration, filed June 7, 1990, and Defendant's Response, filed June 27, 1990.

On June 4, 1990, the Court entered judgment for Defendants on the ground that Plaintiff filed suit outside of the two-year statute of limitations, dismissed Plaintiff's § 1983 claim for lack of jurisdiction, and dismissed Plaintiff's state law malicious prosecution claim pursuant to United Mine Workers v. Gibbs, 383 U.S. 715 (1966).

Plaintiff's sole argument urging reconsideration is that the Court erred in determining when a § 1983 cause of action accrues. Plaintiff relies on Rose v. Bartle, 871 F.2d 331 (3rd Cir. 1989). In Rose, the Third Circuit held that a § 1983 malicious prosecution claim accrues on the date that the criminal proceedings are resolved in the plaintiff's favor. See id. at 348. The Rose court, however, recognized a split

among the circuit courts on this issue. See id. Of course, this Court is bound by Fifth Circuit authority.

In Helton v. Clements, 832 F.2d 332 (5th Cir. 1987), the Fifth Circuit stated that a § 1983 cause of action accrues "the moment the plaintiff knows or has reason to know of the injury that is the basis of his complaint. Thus, the statute of limitations begins to run from the moment the plaintiff becomes aware that he has suffered an injury or has sufficient information to know that he has been injured." Id. at 334-35 (footnote omitted). This is the standard used by the Court in its June 4, 1990 Memorandum Opinion and Order.

Plaintiff's Motion for New Trial and Reconsideration is **DENIED**.

SO ORDERED.

DATED: AUGUST 7, 1990.

/s/ Barefoot Sanders
BAREFOOT SANDERS,
CHIEF JUDGE UNITED STATES
DISTRICT COURT NORTHERN
DISTRICT OF TEXAS

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS DALLAS DIVISION

JAY BRUMMETT,	§	
Plaintiff,	§	
v.	§	**Civil Action No. CA3-87-0789-H**
JIMMY CAMBLE, et al.,	§	
Defendants.	§	

JUDGMENT

This Judgment is entered pursuant to the Court's Memorandum Opinions and Orders dated January 13, 1988 (by Judge Porter) and June 4, 1990.

IT IS ORDERED, ADJUDGED and DECREED by the Court that Plaintiff's federal claims against Defendants be, and they are hereby, **DISMISSED** on the merits, and that Plaintiff's state law claims be, and they are hereby, **DISMISSED** without prejudice.

SIGNED this 4th day of June, 1990.

/s/ Barefoot Sanders
BAREFOOT SANDERS,
CHIEF JUDGE UNITED STATES
DISTRICT COURT NORTHERN
DISTRICT OF TEXAS

APPENDIX E

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS DALLAS DIVISION

JAY BRUMMETT,	§	
Plaintiff,	§	
v.	§	**Civil Action No. CA3-87-0789-H**
JIMMY CAMPBELL, et al.,	§	
Defendants.	§	

MEMORANDUM OPINION AND ORDER

Before the Court is Defendants' Motion for Summary Judgment, filed December 21, 1988; and Plaintiff's Response, filed January 30, 1989.

I. INTRODUCTION

Plaintiff Brummett was indicted by the Johnson County Grand Jury for a felony violation of Tex. Penal Code § 32.33 on July 1, 1983. The gravamen of the alleged offense was that Plaintiff hindered a creditor by selling off collateral securing a debt to the creditor. On April 3, 1986, this indictment was dismissed without trial.

Plaintiff has sued two separate sets of Defendants alleging that they deprived him of his civil rights in violation of 42 U.S.C. § 1983 and that they maliciously prosecuted him. The Court dismissed the entire case on June 1, 1987, but granted Plaintiff leave to replead. After Plaintiff amended his complaint, the Court dismissed a group of defendants who

were public officials because they were officially immunized from this suit. See Court's Order of January 13, 1988. The remaining Defendants, Jimmy Campbell, Jim Boles, Doug Sanders, and First State Bank of Cleburne, all private citizens, now move for summary judgment.

II. SUMMARY JUDGMENT

Summary judgment is proper when the pleadings and evidence on file show that no genuine issue exists as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56. A movant for summary judgment need not support his motion with evidence negating his opponent's case. Celotex Corp. v. Catrett, 477 U.S. 317, 324, 106 S. Ct. 2548, 2553 (1986). Summary judgment may be entered against a party if after adequate time for discovery the party fails to establish the existence of an element essential to his case and as to which he will bear the burden of proof at trial. Celotex, supra, 477 U.S. at 324-26. A trial court may deny summary judgment, however, when reason exists to believe that the better course would be to proceed to trial. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S.Ct. 2505, 2513-14 (1986).

III. ANALYSIS

The Court originally dismissed Plaintiff's Complaint against the private defendants because Plaintiff had failed to demonstrate any "state action" on the part of these defendants that would subject them to liability under 42 U.S.C. § 1983. See Court's Order of June 1, 1987. In his amended complaint, Plaintiff alleged a conspiracy between the private and public defendants in order to establish an actionable claim

under § 1983. Amended Complaint ¶ 18; see Smith v. Winter, 782 F.2d 508, 512 (5th Cir. 1986). It is now apparent that Plaintiff has filed suit outside the statute of limitations applicable to § 1983 claims and is barred from their prosecution in this Court.

Under § 1983, state law supplies the relevant limitations statute. Helton v. Clements, 832 F.2d 332, 334 (5th Cir. 1987). In Wilson v. Garcia, 471 U.S. 261 (1985), the Supreme Court held that claims arising under § 1983 should be characterized as personal injury actions in determining which state statute of limitation is applicable to a § 1983 claim. Thus, the two-year limitation on personal injury actions in Texas applies here. Tex. Civ. Prac. & Rem. Code Ann. § 16.003 (Vernon 1986); Peter Henderson Oil Co. v. City of Port Arthur, 806 F.2d 1273, 1275 (5th Cir. 1987).

Federal law determines when a § 1983 cause of action accrues. Helton, supra, 832 F.2d at 334. Fifth Circuit authority instructs that a § 1983 cause of action accrues "the moment the plaintiff knows or has reason to know of the injury that is the basis of his complaint. [footnote omitted]. . . . [T]he statute of limitations begins to run from the moment the plaintiff becomes aware that he has suffered an injury or has sufficient information to know that he has been injured." Id. at 334-35. Application of this standard requires that the plaintiff be in possession of the "critical facts" that he has been hurt and that he has some knowledge of the person(s) inflicting the injury. Lavellee v. Listi, 611 F.2d 1129, 1131 (5th Cir. 1980).

Under these rules, Plaintiff clearly knew of his injury and who inflicted it as early as June 27, 1983, when he testified before the grand jury. Just prior to testifying, Plaintiff saw defendant Sanders leaving the jury room, and was informed by defendant Sanders that "he was only doing what he had been told." Brummett Aff. ¶ 28. Plaintiff was indicted on July 1, 1983 for an alleged offense related to his debt to the defendant bank. By Plaintiff's account, on or about that same day he surrendered to the police, was restrained in the jail cellar, fingerprinted and released. These events took place nearly four years before Plaintiff filed this suit on March 26, 1987. On or about July 1, 1983, Plaintiff clearly possessed the critical facts of his injury and had or should have had a fair notion that the bank and its employees (some of whom are the remaining private defendants) were the likely cause of his troubles. Plaintiff therefore filed his § 1983 lawsuit outside the two-year limitations period and this claim must be dismissed.

IV. CONCLUSION

The Court **GRANTS** Defendants' motion for summary judgment on the grounds that Plaintiff filed suit outside of the two-year statute of limitations and **DISMISSES** Plaintiff's § 1983 action without prejudice for lack of jurisdiction. The Court declines to exercise pendent jurisdiction over Plaintiff's state law malicious prosecution claim and it is DISMISSED without prejudice to the refiling thereof. United Mine Workers v. Gibbs, 383 U.S. 715, 726 (1966) (court's discretion in exercise of pendent jurisdiction); Evans v. City of Dallas, 861 F.2d 846, 853 (5th Cir. 1988)

(same); see also Tex. Civ. Prac. & Rem. Code Ann. § 16.064 (tolling of limitations); Matter of Paso Del Norte Oil Co., 755 F.2d 421, 426 n.7 (5th Cir. 1985) (same).

SO ORDERED.

DATED: June 4, 1990.

/s/ Barefoot Sanders
BAREFOOT SANDERS,
CHIEF JUDGE
UNITED STATE DISTRICT
COURT NORTHERN
DISTRICT OF TEXAS

APPENDIX F

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS DALLAS DIVISION

JAY BRUMMETT,	§	
	§	
Plaintiff,	§	
	§	
v.	§	
	§	**CA3-87-0789-H**
JIMMY CAMBLE, et al.,	§	
	§	
	§	
Defendants.	§	

ORDER

Defendants seek to dismiss plaintiff's first amended complaint for failure to state a claim upon which relief can be granted. The complaint IS DISMISSED as to defendants, Boulware, MacLean and Johnson County, Texas. The complaint IS NOT DISMISSED as to defendants, Jimmy Camble, Jim Boles, Doug Sanders and First State Bank of Cleburne.

I. Background

In this case plaintiff alleges that defendants, a bank from which plaintiff had borrowed money, several of the bank's officers, and two former district attorneys with alleged connections to the bank, entered into an agreement to cause plaintiff to be illegally arrested. Plaintiff's Amended Complaint at Paragraph 18. On June 1, 1987, the Court dismissed the complaint but granted the plaintiff leave to replead with an eye toward satisfying the heightened pleading

requirements imposed by Elliot v. Perez, 751 F.2d 1472, 1479 and n. 20. (5th Cir. 1985).

II. The Motions to Dismiss

A. Applicable Standards

It is well established that a complaint should not be dismissed for failure to state a claim unless the plaintiff could prove no set of facts in support of his claim which would entitle him to relief. Conley v. Gibson, 355 U.S. 41, 45-46 (1957). "This standard has long been a staple of federal practice and is supported by literally hundreds of cases." Elliot 751 F.2d at 1479. See also Kaiser Aluminum & Chemical Sales, Inc. v. Avondale Shipyards, Inc., 677 F.2d 1045, 1050 (5th Cir. 1982), cert. denied, 459 U.S. 1105 (quoting 5 C. Wright & A. Miller, Federal Practice and Procedure Section 1357 at 598 (1969)). It is equally well established that where the defense of official immunity is invoked, plaintiffs are required to submit a "detailed complaint alleging with particularity all material facts on which he contends he will establish his right to recovery, which will include detailed facts supporting the contention that the plea of immunity cannot be sustained." Elliot 751 F.2d at 1482.

B. The "Public Defendants"

In an attempt to defeat the immunity defense asserted by defendants, Boulware, MacLean and Johnson County, Texas (the "public defendants"), the plaintiff relies on Beard v. Udall, 648 F.2d 1265 (9th Cir. 1981). In Beard, the plaintiff alleged that the attorney "caused the criminal charge to be filed in order to further the progress of another related civil suit that the attorney had filed on behalf of one of his clients, and that

he filed the criminal charges knowing they were baseless." The appellate court held that "where a prosecutor faces an actual conflict of interest, and files charges he or she knows to be baseless, the prosecutor is acting outside the scope of his or authority and thus lacks immunity.... [A]ssuming Beard's allegations [of conspiracy] ... are true, we conclude that [the attorney] was acting beyond the scope of his authority and thus does not enjoy absolute immunity." See also Morrison v. City of Baton Rouge, 761 F.2d 242, 245-46.

Plaintiff's reliance on Beard is clearly misplaced. The Ninth Circuit has, at minimum, withdrawn from its holding in Beard, and, perhaps even rejected it completely. See Ashelman v. Pope, 793 F.2d 1072, 1077-78 (9th Cir. 1986) (en banc). More importantly, the Fifth Circuit has rejected the Beard approach. Holloway v. Walker , 765 F.2d 517 reh. den. 773 F.2d 1236, cert. denied, 106 S.Ct. 605 (1985) ("[W]here the alleged harm, though resulting from a bribe or conspiracy, was inflicted by acts to which absolute immunity would apply, the complaint is insufficient to avoid judicial immunity.") The plaintiff's complaint against the public defendants must be, and hereby is, dismissed.

C. The Private Defendants

1. "Private Conspirators" Do Not Enjoy Derivative Immunity and the Absolute Immunity of "Public Conspirators" Does Not Preclude a Showing of State Action

In its June 1, 1987 order, the court ordered plaintiff's Section 1983 cause of action against Camble, Boles, Sanders, and the First State Bank of Cleburne ("the private defendants") dismissed because plaintiff did not sufficiently

allege state action. As discussed above, the court directed plaintiff to replead his cause of action. Having reviewed the plaintiff's amended complaint, and plaintiff's response to defendants' motion to dismiss the amended complaint, the court is of the opinion that plaintiff's complaint against the private defendants should not be dismissed.

In their "Reply to Plaintiff's Response to Defendants' Motion to Dismiss [Plaintiff's First Amended Complaint]," the private defendants argue that "since Plaintiff did not replead facts so as to assert a cause of action against the State officials, Plaintiff's claims against the Defendants, who are not state officials must fail." Defendant's Reply at 3. This contention is contrary to established law. Automatic dismissal of the complaint against the private defendants does not follow from the fact that the public defendants are entitled to immunity as a matter of law. Dennis v. Sparks, 449 U.S. 24 (1980) (affirming Sparks v. Duval County Ranch Company, Inc., 604 F.2d 976 (5th Cir. 1979) *(en banc)* (abolishing derivative immunity for private persons who conspire with absolutely immune state officials)).

In Dennis v. Sparks, Justice White, writing for a unanimous court, held that private parties who conspired with a judge in connection with an official judicial act were acting "under color of" state law and an action could be maintained against them even though the judge enjoyed immunity. The Court first noted that a person who is not an officer of the state can act "under color of state law" if he or she is a "willful participant in joint action with the State or its agents." Id. at 27.

The Court then addressed the state action issue by reference to its holding in Adickes v. S.H. Kreske & Co., 398 U.S. 144, 152. ("The involvement of a state official in such a conspiracy plainly provides the state action essential to show a direct violation of petitioner's . . . . rights, whether or not the actions of the police were officially authorized, or lawful.") Dennis, 449 U.S. at 27. It is clearly established that plaintiff's failure to state a cause of action against the public defendants does not preclude him from stating a cause of action against the private defendants.

2. Lack of Specificity

Defendants' objection that plaintiff merely alleges a conspiracy, and does not provide specific facts to prove his theory, Defendants, Reply at 4, is premature.[1] The policy considerations underlying the heightened pleading requirement imposed on plaintiffs by Elliott are not present in the case of private defendants.

3. Conclusion

The plaintiff has alleged that public defendants, acting under a conflict of interest, joined with the private defendants in conspiring to have him plaintiff unlawfully arrested and deprived him of his constitutionally protected rights. See

1 Cf. Crowe v. Lucas, 595 F.2d 985 (5th Cir. 1979) (In conspiracy case where defendants had participated in private meetings at which plaintiff was discussed and had engaged in illegal conduct, including several arrests directed at plaintiff, the court noted the plaintiff's showing that defendants agreed to commit an illegal act is typically met by circumstantial evidence because "conspirators rarely formulate their plans in ways susceptible to proof by direct evidence.') See also Hampton v. Hanrahan, 600, 620-623 (7th Cir. 1979) (circumstantial evidence may be sufficient to prove an agreement between the conspirators.)

Plaintiff's Amended Complaint at Par. 18. The current inquiry is limited simply to whether it appears beyond doubt that plaintiff can prove no set of facts which would entitle him to relief. Having reviewed the pleadings in light of Fed.R.Civ.Pro. 12(b)(6) and the pertinent authorities, the court is of the opinion that plaintiff's complaint as to the private individuals should not be dismissed.

III. The Pendent Claims

It is appropriate for the court to retain jurisdiction of plaintiff's state law claims because 1) the case involves a substantial federal claim, 2) the state and federal claims arise from a common nucleus of operative facts, and 3) the claims are such that the plaintiff would ordinarily be expected to try them in one proceeding. United Mine Workers v. Gibbs, 383 U.S. 715, 716 (1966). The exercise of pendent jurisdiction over plaintiff's state law claims is proper and would further the interest of judicial economy. Accordingly, defendants' motion to dismiss the state law claims is DENIED.

SO ORDERED this 13th day of January, 1988.

/s/ Robert W. Porter
Robert W. Porter
UNITED STATES DISTRICT JUDGE

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

JAY BRUMMETT,	§	
	§	
v.	§	
	§	**CA3-87-789-F**
JIMMY CAMBLE, JIM BOLES, DOUG SANDERS, DAN BOULWARE, JOHN R. MACLEAN, FIRST STATE BANK OF CLEBURNE, TEXAS, and JOHNSON COUNTY, TEXAS	§	

ORDER

Before the Court come two motions to dismiss. One is from Defendants Camble,[1] Boles, Sanders, and First State Bank of Cleburne. The other is from Defendants Boulware, MacLean, and Johnson County, Texas.

Plaintiff basically alleges that Defendants conspired to bring an indictment against Plaintiff to force him to pay back a loan.

The Court now considers the motion to dismiss of Defendants MacLean, Boulware, and Johnson County, Texas.

Defendants MacLean and Boulware are dismissed. Plaintiff only alleges with respect to Defendants that they were

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[1] This defendant's name has sometimes been spelled "Campbell" in the briefs. Nothing from the pleadings indicates that there are two different persons to match the two different names. For consistency, the Court will use the spelling in the complaint.

the district attorneys of Johnson County, Texas, that they were acting under color of law, and that they directed and approved the prosecution and arrest of Plaintiff, that they corruptly influenced the Johnson County Grand Jury to bring an indictment against Plaintiff, and that MacLean has violated conflict of interest rules. No specific facts are alleged.

However, specific facts must be alleged in a case brought under 42 U.S.C. § 1983, as this one is. Elliott v. Perez, 751 F.2d 1472, 1479 & n.20 (5th Cir. 1985).

Further, Defendants MacLean and Boulware enjoy prosecutorial immunity. Imbler v. Pachtman, 424 U.S. 409, 427 (1976); Slavin v. Curry, 574 F.2d 1256, 1265 (5th Cir. 1978)((prosecutor sued for bringing charges before grand jury).

Plaintiff argues that the Fifth Circuit has held that where a prosecutor acts in self interest, then he is not immune from a section 1983 suit. Plaintiff's case, Ryland v. Shapiro, 708 F.2d 967 (5th Cir. 1983) does not hold this. Ryland held that the alleged actions of the Defendants in falsifying a death certificate and in covering up a murder for a period of eleven months were actions performed outside their role as prosecutors. Id. at 975. Thus the key to immunity analysis here is whether actions performed were done outside the role of prosecutor. The Court finds that the actions taken here were not outside the role of prosecutor. The First State Bank of Cleburne had filed a complaint and the prosecutors brought charges. This is not outside their role.

Johnson County, Texas is also dismissed because Plaintiff has failed to allege specific facts. Plaintiff makes the

same vague allegations against Johnson County, Texas that it did against Boulware and MacLean. Elliott v. Perez, 751 F.2d 1472, 1479; Palmer v. City of San Antonio, Tex., 810 F.2d 514, 516 (5th Cir. 1987).

The remaining Defendants, Camble, Boles, Sanders, and the First State Bank of Cleburne, are also dismissed, because they have not engaged in state action. A private person has not engaged in state action when he merely lodges a complaint with the police, the prosecutor, or when he invokes the exercise of judicial authority. Sims v. Jefferson Downs Racing Ass'n, 778 F.2d 1068, 1079 n.7 (5th Cir. 1985).

Therefore, Plaintiff's case is dismissed. However, mindful of the Fifth Circuit's policy to permit Plaintiffs to replead to state a cause of action, Plaintiff shall have twenty days from the date of this order to replead. Plaintiff is cautioned, however, that he must plead specific facts against the state officials. Failure to do so may invoke Fed. R. Civ. P. 11 sanctions.

So ORDERED this 1st day of June, 1987.

/s/ Robert W. Porter
ROBERT W. PORTER
UNITED STATES DISTRICT JUDGE

APPENDIX H

TEX. PENAL CODE § 32.33, AS WRITTEN ON JULY 1, 1983[1]

§ 32.33. Hindering Secured Creditors

(a) For purposes of this section:

(1) "Remove" means transport, without the effective consent of the secured party, from the state in which the property was located when the security interest or lien attached.

(2) "Security interest" means an interest in personal property or fixtures that secures payment or performance of an obligation.

(b) A person who has signed a security agreement creating a security interest in property or a mortgage or deed of trust creating a lien on property commits an offense if, with intent to hinder enforcement of that interest or lien, he destroys, removes, conceals, encumbers, or otherwise harms or reduces the value of the property.

(c) For purposes of this section, a person is presumed to have intended to hinder enforcement of the security interest or lien if, when any part of the debt secured by the security interest or lien was due, he failed:

(1) to pay the part then due; and

(2) if the secured party had made demand, to deliver possession of the secured property to the secured party.

(d) Except as provided in Subsections (e) and (f) of this seection, an offense under this section is a Class A misdemeanor.

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[1] The foregoing act has been amended only once (an amendment to subsection (f)) in the years since 1979. That amendment, made effective on September 1, 1985, applied only to unlawful sales or other dispositions occurring after the effective date of the amendment. *See* 1985 Acts., Tex. Leg. ch. 914 §§ 5, 6(c), 6(d).

(e) If the actor removes the property, the offense is a felony of the third degree.

(f) A person commits an offense if he transfers or otherwise disposes of secured property without the effective consent of the secured party and with intent to appropriate (as defined in Chapter 31 of this code) the interest of the secured party. An offense under this subsection is:

(1) A class A misdemeanor if the unpaid balance remaining on the secured indebtedness is less than $10,000;

(2) a felony of the third degree if the unpaid balance on the secured indebtedness is $10,000 or more.

RELEVANT STATUTES OF LIMITATION FROM TEXAS CIVIL PRACTICE AND REMEDIES CODE

§ 16.002 One-Year Limitation Period

A person must bring suit for malicious prosecution, libel, slander, or breach of promise of marriage not later than one year after the day the cause of action accrues.

§ 16.003 Two-Year Limitations Period

(a) A person must bring suit for trespass for injury to the estate or to the property of another, conversion of personal property, taking or detaining the personal property of another, personal injury, forcible entry and detainer, and forcible detainer not later than two years after the day the cause of action accrues.

(b) A person must bring suit not later than two years after the day the cause of action accrues in an action for injury resulting in death. The cause of action accrues on the death of the injured person.

Supreme Court, U.S.
FILED
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(2)

No. 91-1515

In The

Supreme Court of the United States

October Term, 1991

JIMMY CAMPBELL, JIM BOLES, DOUG SANDERS, AND FIRST STATE BANK OF CLEBURNE, TEXAS,

Petitioners,

vs.

JAY BRUMMETT,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Petitioners claim the following issues should be considered by the Supreme Court. It is the respondent's position that none of them merit review by the Supreme Court.

1. Whether the limitations period applicable to a § 1983 claim premised on "malicious prosecution" begins to accrue only when the underlying criminal proceeding has been terminated in favor of the § 1983 plaintiff?

2. Whether the Civil Rights Act of 1871, 42 U.S.C. § 1983, provides a cause of action for "malicious prosecution"?

3. Whether a 1983 cause of action for malicious prosecution, if any, is coextensive with the same common law tort of "malicious prosecution"?

4. Whether the termination of the underlying criminal proceeding in favor of the § 1983 plaintiff is an essential element of a § 1983 claim premised on "malicious prosecution"?

LIST OF INTERESTED PARTIES

1. The petitioners herein, defendants-appellees below, are Jimmy Campbell, Jim Boles, Douglas Sanders, Dan Boulware, John R. MacLean, First State Bank of Cleburne, Texas, and Johnson County, Texas.

2. The respondent herein, plaintiff-appellant below, is Jay Brummett.

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No. 91-1515

In The

Supreme Court of the United States

October Term, 1991

JIMMY CAMPBELL, JIM BOLES, DOUG SANDERS, AND FIRST STATE BANK OF CLEBURNE, TEXAS,

Petitioners,

v.

JAY BRUMMET,

Respondent

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

OPINION BELOW

The November 14, 1991 opinion of the United States Court of Appeals for the Fifth Circuit, reversing the District Court's granting petitioners' motion for summary judgment is reported at 946 F.2d 1178. The June 4, 1990 and August 8, 1990 orders

of the United States District Court for the Northern District of Texas, from which the appeal was taken, are reprinted as an appendix to petitioners' brief pages A-13 through A-37.

STATEMENT OF JURISDICTION

Jurisdiction requisites are adequately set forth in the petition. However, because the only question that affected the petitioners' position in this case was when a cause of action for malicious prosecution accrues, respondent believes there is no jurisdiction for the Supreme Court to consider anything save the issue of when the statute of limitations accrues on a claim of malicious prosecution.

COUNTERSTATEMENT OF THE CASE

Much of the petitioners' statement of the case is a recitation of the evidence they asserted in the District Court in support of their motion for summary judgment. Reliance or reference to their summary evidence is improper because neither the District Court nor the Court of Appeals for the Fifth Circuit reached or considered any issue except the date upon which a claim of malicious prosecution accrues. In light of this respondent believes the plaintiffs' complaint (and his evidence) should be the primary source for any factual recitation of the facts of this case. (Brummett also presented evidence that supports the following statement of the case.)

At all material times relevant to this matter, Jay Brummett lived and resided in Cleburne, Johnson County, Texas, where he owned and operated a small business, bearing the name "Stereo Center". His business was a retail outlet for the sale of stereo equipment for home, office or automobile use. On January 11, 1982, respondent borrowed the sum of $33,445.80 from the First State Bank of Cleburne, Texas, and executed a promissory note

for this sum in favor of the Bank. As collateral for this note, respondent pledged the inventory in his stereo center business. The note provided that respondent was to repay the note in 42 equal installments, due on the 17th day of each month.

Brummett made timely payments until February 17, 1983. On this occasion he called (petitioner) Doug Sanders, a vice president and loan officer with the First State Bank (hereinafter referred to as Bank) and told him that because of poor business conditions he would be unable to make his payment. Sanders told him to wait 10 days and then call him. Ten days later Brummett again reported his inability to pay but Sanders said to wait until the due date in March and contact him. In March, 1983, respondent told Sanders that his financial situation had deteriorated to the point he would have to close his business. Brummett reported that he was behind with suppliers, bills, etc. In the company of the Bank's collections officer Jim Boles, Sanders visited respondent's store in March, 1983. At this meeting Brummett explained to Sanders and Boles that he had sold most of his inventory over the last several months in the normal course of business. Brummett had gradually decreased his inventory during 1982 and early 1983. He accomplished this by not replacing hard to sell items and reordering smaller quantities. Financial conditions forced Brummett to close the "Stereo Center" the first week in April, 1983. (No one on behalf of the Bank had ever requested Brummett to make reports to them relative to his inventory or financial status. It was understood and contemplated by the Bank that Brummett would in the ordinary course of business sell his inventory to the public.)

In April, 1983, petitioner Sanders called Brummett and asked if he could get his family to sign a new note. Brummett told him that could not be done as he had no way to repay the note. Shortly thereafter Sanders called again and again asked Brummett and his wife to sign a new note. Brummett explained to Sanders that

his financial condition was terrible and he and his wife were contemplating bankruptcy. Sanders then demanded payment in full including interest. Sanders said that he would not be responsible for the consequences of Brummett's failure to comply with this demand.

On May 13, 1983, Brummett received a letter from the Bank's lawyer, demanding payment of the total balance of the note, $17,989.93, in ten days. On June 23, 1983, Brummett received another letter from the Bank's lawyer stating that since the note had not been paid, that the Bank had elected to turn over collection of the note to the District Attorney's office. On that same day, Brummett received a letter dated June 22, 1983, from then Johnson County Attorney Dan Boulware (Boulware was a major stockholder in the First State Bank of Cleburne) stating that Brummett could appear before the Johnson County, Texas Grand Jury on June 30, 1983. Up to this point no one associated with First State Bank of Cleburne had ever suggested that Brummett may have violated any criminal law.

In his complaint Brummett alleged that on or about June 22, 1983, Jimmy Campbell (President of the First State Bank of Cleburne, Texas), Boles and Sanders, County Prosecutor Boulware and Johnson County District Attorney MacLean, acting on behalf of themselves and the First State Bank of Cleburne and Johnson County, Texas, entered into an illegal agreement to cause Brummett to be illegally arrested and maliciously prosecuted for failure to repay his loan to the First State Bank. (District Attorney MacLean sat on the Bank's board of directors and was at the board meeting when the decision was made to refer Brummett to the Grand Jury.) Brummett alleged that in furtherance of this illegal agreement, each of the petitioners agreed that the Johnson County Grand Jury would be purposely misled to believe that respondent had committed a violation of Article 32.33 of the Texas Penal Code, when Brummett had not violated this law. In order

to be convicted of the indictment brought against Brummett pursuant to Texas Penal Code Article 32.33, there had to be evidence that Brummett had the intent to hinder the enforcement of the Bank's security interest and that Brummett had moved part or all of his inventory to another state. There was no evidence that the respondent had intentionally hindered the enforcement of the Bank's security interest, nor was there evidence that he had secreted or moved any of his inventory to another state.

After consulting with a lawyer, Brummett's lawyer advised him to go to the Grand Jury and explain that no crime had occurred. On June 30, 1983, respondent arrived at the Grand Jury meeting room at 8:30 a.m. but he was not called before the Grand Jury until 8:00 p.m. While Brummett was waiting to be called, Sanders (the Bank Vice President) arrived at around 7:30 p.m. Brummett observed Sanders go into the District Attorney's office and Sanders was followed by District Attorney MacLean. Shortly thereafter County Prosecutor Boulware, in the company of another individual, went into MacLean's office. These individuals were together approximately thirty minutes when Prosecutor Boulware came out of the District Attorney's office and entered the Grand Jury meeting room. Brummett was then called before the Grand Jury.

In the Grand Jury room, Prosecutor Boulware, directed Brummett to sit down and he was then placed under oath. Boulware stated that a complaint had been filed by the First State Bank of Cleburne against Brummett which alleged that Brummett had sold mortgaged property in excess of $10,000 without the knowledge or consent of petitioner First State Bank of Cleburne. Boulware showed Brummett a copy of the note and asked if he had signed it. Brummett replied that he had indeed signed it. Boulware then showed Brummett his original inventory sheet dated January, 1982, and asked him if he recognized it as the inventory mentioned in the note. Brummett replied yes. Boulware then asked

if Brummett had sold this inventory. Brummett replied yes. Boulware then told the grand jurors they could ask Brummett questions. Several questions were directed to Brummett, then some of the grand jurors stated that they felt that Brummett had done nothing wrong. One juror stated, "We don't think you're a criminal, Jay." Brummett then asked why, if that was the case, he was there before the Grand Jury. Brummett told the jurors that apparently he was being accused of selling his inventory in the normal course of business, but this was clearly the understanding that he and the Bank had. Brummett then told the Grand Jury that any statement that he did not have the Bank's consent or that the Bank did not have any knowledge that he was selling his inventory simply was not accurate or true. At this point, Boulware held up the loan papers in front of Brummett and loudly stated, "O.K., Jay, let's get the facts straight. You mortgaged property, you sold it, you admit it, and that puts you right in the middle of this statute, and that's the facts." The jurors asked Brummett if he had an agreement with the Bank to keep a certain amount of inventory. Brummett replied no, which appeared to Brummett to surprise the grand jurors. Brummett told them that he had kept current inventories and books, that the Bank had been free to examine them at any time, and that he would have gladly sent the Bank monthly inventory sheets and statements if the Bank had ever asked for them, but the Bank had not. At this point a juror said, "Maybe we had better get the banker back in here." Brummett was excused, and sat down in the hall outside the grand juror's meeting room. A man then came out of the Grand Jury room, went into the District Attorney's office and came out with petitioner Sanders, and went back into the Grand Jury room. Several minutes later, Prosecutor Boulware stuck his head out of the door to the Grand Jury meeting room and told Brummett that he could go home and that they would let him know what happened.

Later Brummett talked with one of the grand jurors. This

juror said that the Grand Jury had been very reluctant to indict him and that the Grand Jury had passed a resolution stating that the Grand Jury did not feel Brummett had violated the law with any criminal intent. The juror also said that the Grand Jury had asked Prosecutor Boulware, to notify Brummett of this resolution, and that Boulware had assured the Grand Jury that he would. The grand juror stated that the Grand Jury was never told anything concerning Brummett taking any of his inventory outside the State of Texas. This resolution was never delivered to Brummett.

On July 1, 1983, Brummett was notified that the Johnson County Grand Jury had indicted respondent on June 30, 1983, for a felony under Article 32.33 of the Texas Penal Code. Because of this indictment, Brummett was arrested, taken into jail, fingerprinted and photographed. (The decision of the Court of Appeals for the Fifth Circuit was incorrect in stating that Brummett was not incarcerated.) After almost three years of court appearances where Brummett was each time threatened with incarceration if he did not repay the loan, the charge was ultimately dismissed on April 7, 1986 on a motion of the Assistant District Attorney for the stated reason that "insufficient evidence" existed for the prosecution of respondent. Thus the prosecution terminated in respondent's favor on April 7, 1986.

Shortly after Brummett was indicted, he filed for bankruptcy. None of the petitioners contested discharge of Brummett's debt to the First State Bank of Cleburne.

REASONS FOR DENYING THE WRIT

I.

THE LIMITATIONS PERIOD FOR A 42 U.S.C. § 1983 ACTION CAN ONLY BEGIN TO ACCRUE WHEN THE UNDERLYING CRIMINAL PROCEEDING HAS TERMINATED IN FAVOR OF THE PLAINTIFF.

As with any civil claim, one must determine the appropriate period of limitation for bringing a malicious prosecution action. To accomplish this, it is necessary to conduct a two-prong analysis and consider both the time at which the limitation period begins to run and the duration of time in which the plaintiff may properly bring his action. An examination of the elements of the action and at which point in time all of the required elements could be present is necessary in order to determine the time at which the statute of limitations clock begins to run.

> At common law the tort of malicious prosecution has four elements: (1) a criminal proceeding initiated or continued by the defendant against the plaintiff; (2) termination of the proceeding in the plaintiff's favor; (3) absence of probable cause; and (4) a primary purpose in prosecuting plaintiff other than bringing him or her to justice.

W. Prosser & W. Keeton, *Law of Torts*, 871 (5th Ed. 1984).

The various courts of appeal appear to agree that malicious prosecution has four elements: (1) the defendant must be found to have instituted a criminal action against the plaintiff; (2) the prosecution must have ended in the plaintiff's favor; (3) there must have been insufficient probable cause to initiate the criminal proceeding; and (4) the defendant must have acted maliciously.

See Dellums v. Powell, 566 F.2d 167, 191 (D.C. Cir. 1977); *Sullivan v. Choquette*, 420 F.2d 674, 676 (1st Cir. 1969); *Jennings v. Shuman*, 567 F.2d 1213 (3rd Cir. 1977); *Wheeler v. Cosden Oil & Chemical*, 744 F.2d 1131 (5th Cir. 1984).

Even though the elements of common law malicious prosecution and those elements as recognized by United States courts of appeal may differ slightly there is universal agreement that the criminal prosecution must terminate in favor of the plaintiff. The requirement that the criminal proceeding must terminate in the plaintiff's favor manifests at the point when the plaintiff (defendant in the criminal procceeding) has been either acquitted of the criminal charges which are the basis of the claim or at the point that those criminal charges are dismissed. The Court of Appeals for the Fifth Circuit rightly concluded:

> In order to sustain [a] . . . conclusion that a malicious prosecution claim under § 1983 accrues prior to favorable termination of the underlying criminal proceeding, one of two propositions must be true: (1) favorable termination is not an element of a § 1983 malicious prosecution claim; or (2) a § 1983 claim may accrue *before* all of its elements are established.
>
> . . .[T]he federal courts have adopted the common law rule that termination of the underlying criminal proceeding in favor of the accused is an essential element of a § 1983 malicious prosecution claim. *See e.g., Torres v. Superintendent of Police*, 893 F.2d 404, 409 (1st Cir. 1990); *Rose v. Bartle*, 871 F.2d 331, 349 (3rd Cir. 1989); *McCune v. City of Grand Rapids*, 842 F.2d 903, 907 (6th Cir. 1988); *Venegas v. Wagner*, 704 F.2d 1144, 1146 (9th Cir. 1983); *Singleton v.*

> City of New York, 632 F.2d 185, 198 (2d Cir.1980), cert. denied, 450 U.S. 920, 101 S.Ct. 1368, 67 L.Ed 2d 62 (1981); *Morrison v. Jones,* 551 F.2d 939, 940-41 (4th Cir. 1977); *Sullivan v. Choquette,* 420 F.2d 674 (1st Cir. 1969), cert. denied, 398 U.S. 904, 90 S.Ct. 1691, 26 L.Ed.2d 62 (1970).

Brummett v. Camble, 946 F.2d 1178 (5th Cir. 1991) (emphasis added).

Considering that the criminal proceeding must terminate in favor of the plaintiff in a malicious prosecution action, the clock on the period of limitation could only begin to run at the point of termination of the criminal proceeding. In this case the criminal charges against Brummett were dismissed for insufficient evidence on April 9, 1986. Therefore the time at which a statute of limitations would begin to run could only be April 9, 1986.

The Court of Appeals reference to the common law is on solid ground because this Court since *Monroe v. Pape,* 365 U.S. 167, 81 S. Ct. 473 (1961) has repeatedly stated that § 1983 litigation should be read against the "background of tort liability." In addition, since *Monroe v. Pape,* this Court has said that when making the determination of the appropriate statute of limitations the courts should rely on the state's statute of limitations for the analogous tort. This however gave rise to uncertainties as to which tort the § 1983 action was most closely aligned. In an attempt to establish uniformity in the statute of limitations in § 1983 actions, this Court in *Wilson v. Garcia,* 471 U.S. 261, 105 S. Ct. 1938, 85 L. Ed. 2d 254 (1985), thoroughly analyzed the existing uncertainties inherent with the broad charaterization of § 1983 claims as being analogous to common law tort claims. This Court determined that § 1983 claims were actually injuries to the person and that the state's statute of limitations for personal injuries would be the statute of limitations for § 1983 actions. *Wilson*

at 471 U.S. 276-79, 105 S. Ct. 1938-39.

The Texas statute of limitations for personal injuries and the one applicable in light of this Court's holdings in *Wilson v. Garcia* is two years. Tex. Civ. Prac. & Rem. Code Ann. § 16.003 (Vernon 1986). Had not this issue been previously settled by this Court, the reliance may have been placed on the Texas statute of limitations specifically provided for malicious prosecution. The Tex. Civ. Prac. & Rem. Code Ann. § 16.002 (Vernon 1986), provides for a one year limitation period for a plaintiff to file a malicious prosecution claim.[1] Considering that the dismissal of the criminal proceedings against Brummett on April 9, 1986 and that on March 26, 1987 Brummett filed his claim, Brummett's complaint was filed within both the Texas one year statute of limitations for malicious prosecution and within the Texas two year statute of limitations for personal injury claims.

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1. Texas law regarding the time the statute of limitations begins to run has been well settled since *Von Koehring v. Witte,* 40 S. W. 63 (Tex. Civ. App. 1887). The question was again laid to rest in *Browning v. Pay-Less Self Service Shoes, Inc.,* 373 S.W. 2d 71 (Tex. Civ. App. 1963) where the court found:

> An essential element of a cause of action for malicious prosecution is a showing that the criminal prosecution has terminated favorably to the plaintiff. Only upon such successful termination does a cause of action for malicious prosecution arise.

II.

NEITHER THE DISTRICT COURT NOR THE COURT OF APPEALS ADDRESSED ANY ISSUES OTHER THAN THE STATUTE OF LIMITATIONS AND THE IMMUNITIES OF THE PARTIES NOT SEEKING CERTIORARI, ANY OTHER ISSUES ARE IMPROPERLY PRESENTED TO THIS COURT FOR APPELLATE REVIEW.

On December 21, 1988, petitioners Campbell, Boles, Sanders and the First State Bank moved for summary judgment. Petitioners had suggested several reasons why they were entitled to summary judgment, but the District Court only responded to their claim that the matter was filed beyond the limitations period and ordered the cause dismissed on June 4, 1990 (Petitioner's Brief, Appendix A-23).

Respondent appealed the District Court's summary judgment and on November 14, 1991, after oral argument, the United States Court of Appeals for the Fifth Circuit, found that the District Court had erred in applying the standards for determining the statute of limitations for a malicious prosecution action and additionally found that the District Court had improperly dismissed the petitioners as defendants. The resulting holding of the Court of Appeals was to *affirm* the District Court's judgment dismissing Boulware and MacLean on the basis of their immunity; *vacate* the trial court's judgment dismissing Johnson County; and *remanded* the case for proceedings consistent with that opinion.

Here, petitioners have ignored fundamental American jurisprudence. Petitioners seek to raise four issues for this Court's review. With the exception of the questions regarding the statute of limitations issue, no other issues raised by them have been decided by the District Court nor the Court of Appeals. To review these issues at this time would in essence require a *de novo*

determination and result in a determination of a summary judgment issue that neither the District Court or the Court of Appeals considered. The petitioners also appear to claim that they presented a challenge to the viability of malicious prosecution to the Court of Appeals. This was not done.

III.

RESPONDENT'S CAUSE OF ACTION RESULTED FROM PETITIONERS' DEPRIVATION OF RIGHTS GUARANTEED HIM BY THE CONSTITUTION.

In their zeal to convince this Court to grant certiorari, petitioners have overlooked several important details. Firstly, petitioners have failed to appreciate that *Baker v. McCollan*, 443 U.S. 137, 99 S. Ct. 2689, 61 L. Ed. 2d 433 (1979) was complied with and inform this Court that Brummett's 1983 claims are bottomed on fundamental constitutional principles. The petitioners/bank officers, etc. in conjunction with their Bank associated prosecutors, initiated a prosecution devoid of "probable cause." In order to legitimately and honestly charge and/or convict Brummett of the indictment they brought against him, they needed evidence that Brummett had intentionally hindered the enforcement of a creditor's security interest and had taken the "inventory" pledged to the loan outside of Texas. This is because the indictment and Texas Penal Code Art. 32.33 required the prosecutor to prove that Brummett had the intent to hinder the enforcement of the Bank's security and that a "removal" had occurred. In the context of the indictment and the statute, "Remove" would mean that Brummett took his inventory out of the State of Texas. There was no evidence that Brummett moved any of his inventory outside Texas. Further, "inventory" by its very nature are goods offered for sale to third parties. The Bank/petitioners knew that Brummett was selling his "inventory" and placed no restrictions on his sale of the inventory. Therefore,

they were never in any position to claim that Brummett violated Texas Penal Code Art. 32.33.

Secondly, the petitioners, in conjunction with the prosecutors, misled the Grand Jury as to the true meaning of Penal Code 32.33. A judge undoubtedly would have required evidence of "Removal" but a Grand Jury of laymen not schooled in the law or of the meaning of probable cause were forced to rely upon a prosecutor(s) associated with the Bank to make a judgment on the prosecutor's misstatement of the law.

This Court has held in *Malley v. Briggs*, 475 U.S. 335, 106 S. Ct. 1092, 89 L. Ed. 2d 271 (1986) that a police officer who misleads a court as to the existence of probable cause is liable to the persons named or affected by the execution of his warrant. That same principle should equally apply to persons who cause a prosecution in the absence of probable cause to occur. Clearly, the Fifth and Fourteenth Amendment due process clauses, as well as the Fourth Amendment requirement for probable cause, protects against a deprivation of liberty such as the one presented herein. When a citizen is prosecuted, his liberty is clearly subjected to jeopardy and this would invoke Fifth and/or Fourteenth Amendment protection. The due process clause was intended to secure an individual from an abuse of power by government officials. *See e.g., Daniels v. Williams*, 474 U.S. 327, 106 S. Ct. 662, 88 L. Ed. 2d 662 (1986); *Baker v. McCollan*, 443 U.S. 137, 99 S. Ct. 2689, 61 L. Ed. 2d 433 (1979); *Gerstein v. Pugh*, 420 U.S. 103, 95 S. Ct. 854, 43 L. Ed. 2d 54 (1975). Therefore, contrary to the petitioner's claims, Brummett's § 1983 malicious prosecution claims are based on constitutional principles. Fifth and/or Fourteenth Amendment "due process" as well as absence of Fourth Amendment "probable cause" provide ample constitutional basis for Brummett's claims. Brummett's prosecution could not have been accomplished without the

misstatement of the law and the absence of probable cause by the prosecutors.

A Grand Jury indictment is in effect a finding of probable cause and the issuance of a *capias* warrant based on an indictment is nothing more than a ministerial act of the clerk of the court where the indictment is filed. Therefore, the persons who stand in the position of establishing probable cause are in the same "stead" as those who present a "warrant" to a judge not bottomed on probable cause. *See Malley v. Briggs, supra. See also, Franks v. Delaware,* 438 U.S. 154, 98 S. Ct. 2694, 57 L. Ed. 2d 667 (1978). In *Franks v. Delaware*, this Court recognized that the Fourth Amendment was violated when false information is presented to a "Magistrate" to obtain a warrant. Reading *Malley v. Briggs* and *Franks v. Delaware* together, as well as recognizing that the "due process" clause was intended to secure an individual from an abuse of power by "government" officials can lead but to one conclusion, the Constitution protects an individual against an unconstitutional prosecution. *See also, Daniels v. Williams, supra.*

IV.

THE VARIOUS FEDERAL COURTS RECOGNIZE THAT THE COMMON LAW TORT OF MALICIOUS PROSECUTION IS ACTIONABLE UNDER 42 U.S.C. § 1983 WHEN A CITIZEN'S CONSTITUTIONAL RIGHTS HAVE BEEN VIOLATED BY THAT MALICIOUS PROSECUTION.

Numerous decisions of this Court recognized that a prosecution can violate the Constitution. *Dombrowski v. Pfister*, 380 U.S. 479, 85 S. Ct. 1116 (1965); *Younger v. Harris*, 401 U.S. 37, 91 S. Ct. 746 (1971). As shown below the Circuit Courts also recognize that prosecution can be violative of constitutional rights and be actionable under 42 U.S.C. § 1983. The only real

disagreement between the Circuits as to when malicious prosecution is actionable under § 1983 appears to be the level of egregious conduct on the part of a defendant who offended the plaintiff's constitutional rights. Brummett's § 1983 malicious prosecution action arose as a result of petitioners' invoking the criminal process without probable cause which denied him his rights to due process and resulted in criminal prosecution for reasons other than to punish a person for a criminal act. At no time had Brummett attempted to secretly dispose of the inventory of the "Stereo Center" or to hide that inventory in or out of the State of Texas. Nonetheless petitioners used criminal process for purposes other than those the statute (Tex. Pen. Code Ann. Art. 32.33) was intended and for the purpose of inducing payment on a debt, that because of Brummett's bankruptcy, could not be collected in civil court.[2] Petitioners' acts operated to trigger Brummett's protections under the Fourteenth Amendment whereby a person is guaranteed freedom from bad faith prosecution and abuse of process by government officials and which made petitioners' conduct actionable under § 1983. *Dombrowski v. Pfister*, at 380 U.S. 490, 85 S. Ct. 1123. "The due process clause of the Fourteenth Amendment was intended to prevent government from abusing [its] power, or employing it as an instrument of oppression." *Collins v. City of Harker Heights*, 112 S. Ct. 1061, 1992 U.S. Lexis 1376, 117 L. Ed. 2d 261, 60 U.S.L.W. 4182 (1992). Petitioners' use of criminal process to coerce Brummett's compliance with their demands is an egregious act which constitutes a denial of due process and is actionable under § 1983. *Lusby v. T.G. & Y. Stores, Inc.*, 749 F.2d 1423, 1431 (10th Cir. 1984).

The Johnson County District Attorney and the County

2. *See In Re Seidelman, Bankruptcy*, 57 B.R. 149 (D. Md. 1986), where Bankruptcy Court entered injunction prohibiting the Texas prosecution of a debtor under Texas Penal Code art. 32.33 where creditor initiated criminal prosecution in bad faith and in retaliation for debtor filing bankruptcy.

Prosecutor presented to the Grand Jury false information provided them by petitioners which the petitioners and the District Attorney and the County Prosecutor knew did not give rise to probable cause necessary to prosecute Brummett under the Texas criminal statute.

The indictment returned against the respondent on June 22, 1983 and then dismissed on April 9, 1986, stated as follows:

> IN THE NAME AND BY AUTHORITY OF THE STATE OF TEXAS
>
> The Grand Jurors for the County of Johnson, State of Texas, duly selected, impaneled, sworn, charged and organized as such at the January Term, A.D., 1983, of the 249th Judicial District Court of said County, upon their oaths present in and to said Court, that JAY BRUMMETT, on or about the 22nd day of June, A.D. 1983, and before the presentment of this indictment, in said County and State, did then and there intentionally and knowingly signed a security agreement which created a security interest in property, namely, stereo equipment, did then and there, with intent to hinder enforcement of such security interest, remove the property;
>
> AGAINST THE PEACE AND DIGNITY OF THE STATE.
>
> s/ Benson Shuhorn
> Foreman of the
> Grand Jury

The conduct of the petitioners as well as the District Attorney

and the County Prosecutor injured Brummett by obtaining that indictment by knowingly providing the Grand Jury both false information and misleading information concerning probable cause.

> If . . . the Fourteenth Amendment imposes a duty on state prosecutors to charge [criminal wrongdoing] only upon ascertaining probable cause, it follows that one acting under state authority . . . can be liable for subterverting the performance of that duty, as by maliciously tendering false information to the prosecutor which leads him to believe probable cause exists where there is none. Since this would violate federally guaranteed rights, it therefore can be grounds for a § 1983 action.

Wheeler v.Cosden Oil Co., 734 F.2d 254 (5th Cir. 1984).

> The defendant may be liable for either initiating or for continuing a criminal prosecution without probable cause. . . .[I]f he advises or assists another person to begin the proceeding, ratifies it when it is begun in his behalf, or takes an active part in directing or aiding the conduct of the case, he will be responsible.

Hampton v. Hanrahan, 600 F.2d 600, 630 (7th Cir. 1979); Prosser, Torts (4th ed. 1971) pp. 836-37. *See also, Bank of Nova Scotia v. United States*, 487 U.S. 250 (1988), considering prosecutorial misconduct.

Regardless of whether petitioners were responsible directly or indirectly for causing Brummett's malicious prosecution, a private citizen, acting in concert with public officials, is liable under

§ 1983. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 152, 90 S. Ct. 1598, 26 L. Ed. 2d 142 (1970); *Dennis v. Sparks*, 449 U.S. 24, 101 S. Ct. 183, 66 L. Ed. 2d 185 (1980).

The absence of probable cause is an essential element of an action for malicious prosecution. *Banish v. Locks*, 414 F.2d 638, 640 (7th Cir. 1969). Here petitioners rely on the Grand Jury indictment to claim the Grand Jury found probable cause and that Brummett's Fifth and Fourteenth Amendment rights to due process were not violated.[3] However, even where an indictment is obtained by an improper finding of probable cause and is tainted by the malicious actions of government officials, that indictment is not enough to insulate the state actor against malicious prosecution under § 1983. *Hand v. Gray*, 838 F.2d 1420 (5th Cir. 1988). "It is clear that the filing of [criminal] charges without probable cause and for reasons of personal animosity is actionable under § 1983." *Losch v. Borough of Parkesburg, Penn.*, 736 F.2d 903, 907 (3d Cir. 1984); *Inada v. Sullivan*, 523 F.2d 485, 487-88 (7th Cir. 1975). ". . . [A]ny of the pretestimonial acts that may have undermined the federally guaranteed right to be free of malicious prosecution can form the basis of a § 1983 action." *Strength v. Hubert*, 854 F.2d 421, 426 (11th Cir. 1988).

"For procedural due process purposes in a claim of malicious prosecution, the plaintiff usually must show the alleged conduct deprived him of liberty by distortion and corruption of the process of law, *i.e.*, corruption of witnesses, falsification of evidence, or some other egregious conduct. . ." *Torres v. Superintendent*

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3. The Johnson County Grand Jury passed a resolution that the Grand Jury did not feel that Brummett had any criminal intent. In addition the Grand Jury was never presented any evidence that inventory was removed from Texas. The Grand Jury asked County Prosecutor Boulware to notify Brummett and/or his attorney of the resolution. Neither Brummett nor his attorney were advised by Boulware or any other Johnson County official of the Grand Jury resolution.

of Police of Puerto Rico, 893 F.2d 404, 410 (1st Cir. 1990); *Dunn v. State of Tenn.*, 697 F.2d 121, 125 (6th Cir. 1982). Brummett properly alleged in his complaint that petitioners caused him to be incarcerated and caused him the anguish and expense of defending himself in court for almost three years because of the criminal indictment brought against him. ". . .[His] deprivation of liberty without 'reasonable cause' is a section 1983 violation as to which the defendant bears the burden of proving reasonableness, and a subjective good faith belief in the legality of the arrest [and prosecution] is not enough. . ." *Raysor v. Port Authority of New York and New Jersey*, 768 F.2d 34, 40 (1985).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari filed by the petitioners Jimmy Campbell, *et al.* should be denied.

Respectfully submitted,

DOUGLAS R. LARSON
Attorney for Respondent

SUPREME COURT OF THE UNITED STATES

JIMMY CAMPBELL ET AL. *v.* JAY BRUMMETT

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 91-1515. Decided June 1, 1992

The petition for a writ of certiorari is denied.

JUSTICE WHITE, dissenting.

The Court once again declines to grant certiorari in a case in which the petitioners raise a subject of clear disagreement among the Courts of Appeals. Once again, I dissent. The questions presented concern whether 42 U. S. C. § 1983 provides a cause of action for malicious prosecution and, if so, when the cause of action accrues.

Respondent was prosecuted for failing to repay a loan to respondent First State Bank of Cleburne, Texas. The loan, for more than $30,000, had been collateralized by the equipment and inventory of his stereo business. Respondent, who said that he sold the inventory in the normal course of business, was indicted under a provision of the Texas Penal Code that makes it a felony to "remove" from the State collateral securing a debt. Tex. Pen. Code § 32.33. After three years of court appearances, the charge was dismissed for insufficient evidence.

Respondent sued the prosecuting attorneys, the county, the bank, and certain bank employees, alleging that they conspired to prosecute him maliciously in violation of state law and § 1983. The district court dismissed the action as to the county and the prosecuting attorneys on immunity grounds and entered summary judgment as to the remaining defendants on the ground that respondent's claims were time-barred.

The Court of Appeals reversed in relevant part.[1] Although it noted that there has been considerable confusion in the circuit courts concerning the availability and contours of a § 1983 malicious prosecution claim, see *Brummett* v. *Campbell*, 946 F. 2d 1178, 1180 n.2 (CA5 1991) (collecting cases), the court observed that recent Fifth Circuit cases "have assumed that malicious prosecution violates § 1983." *Ibid.* The court then held that respondent's claim was not time-barred because a cause of action for malicious prosecution under § 1983 does not accrue until the underlying prosecution has terminated in favor of the criminal defendant. *Id.*, at 1184.

The Third, Sixth and Tenth Circuits follow the rule that the Fifth Circuit applied here. See *Robinson* v. *Maruffi*, 895 F. 2d 649, 654 (CA10 1990); *Rose* v. *Bartle*, 871 F. 2d 331, 349 (CA3 1989); *McCune* v. *City of Grand Rapids*, 842 F. 2d 903, 907 (CA6 1988). However, the First Circuit has held that a malicious prosecution claim accrues at the time of arrest and not when the allegedly abusive proceeding comes to a conclusion, which may be years later. *Warden III, Inc.* v. *State of Rhode Island*, 576 F. 2d 945, 947 n. 5 (CA1 1978). The Ninth Circuit's treatment of the question has been inconsistent. Compare *Clive* v. *Brusett*, 661 F. 2d 108, 111 (CA9 1981) (following majority rule), with *Gowin* v. *Altmiller*, 663 F. 2d 820, 822 (CA9 1981) (following minority rule).

Clearly, this is an area of law that requires our attention. Therefore, I would grant certiorari to determine if a cause of action for malicious prosecution is available under § 1983 and, if it is, when the cause of action accrues.

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[1]The Fifth Circuit agreed with the district court that the prosecutors were immune, but vacated the judgment as to the county to allow "for further consideration in light of later events in trial court." *Brummett* v. *Campbell*, 946 F. 2d 1178, 1183 (CA9 1991). The county is not a party to this petition.